(17,352.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 767.

SAMUEL NELSON, PLAINTIFF IN ERROR,

vs.

DENNIS MOLONEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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a No. 367.

The People of the State of New York, by the grace of God free and independent, to all to whom these presents shall come or may concern, Greeting:

Know ye that we, having examined the records and files in the office of the clerk of the county of New York and Seal New York. clerk of the supreme court of said State for said county, do find a certain record there remaining in the words and figures following, to wit:

b Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals held at the capitol, in the city of Albany, on the 28th day of February, in the year of our Lord one thousand eight hundred and ninety-nine, before the judges of said court.

Witness the Hon. Alton B. Parker, chief judge, presiding.

W. H. SHANKLAND, *Clerk.*

Remittitur March 2nd, 1899.

DENNIS MALONEY, Respondent,
vs.
SAMUEL NELSON, Appellant.

Be it remembered that on the 28th day of December, in the year of our Lord one thousand eight hundred and ninety-six, Samuel Nelson, the appellant in this action, came here into the court of appeals, by James M. Smith, his attorney, and filed in the said court a notice of appeal and return thereto from the judgment and order of the appellate division of the supreme court in and for the c first judicial department, and Dennis Maloney, respondent in this action, afterwards appeared in said court of appeals by Kellogg, Rose & Smith, his attorneys, which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon the said court of appeals, having heard this cause argued by Mr. William H. Newman, of counsel for the appellant, and by Mr. L. Laflin Kellogg, of counsel for the respondent, and after due deliberation had thereon—

Did order and adjudge that the judgment and order of the supreme court appealed from in this action be in all things affirmed; and it was—

Further ordered and adjudged that the respondent recover against the appellant costs of appeal to this court; and it was also—

Further ordered and adjudged that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded with according to law.

Therefore it is considered that the said judgment be in all things affirmed, with costs, as aforesaid, and stand in full force, strength, and effect; and hereupon as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid by them given in the premises are by said court of appeals
d remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in said supreme court before the justices thereof.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *March 2nd*, 1899.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[SEAL.] W. H. SHANKLAND, *Clerk.*

1 Supreme Court, Appellate Division, First Department.

DENNIS MOLONEY, Plaintiff and Respondent,
against
SAMUEL NELSON and Others, Defendants and Appellants.

Case on appeal.

Statement.

This action is for the foreclosure of a mortgage made by defendant Samuel Nelson to the plaintiff, on the 16th day of October, 1891. This action was commenced on the 28th day of January, 1895, by the service of summons and complaint. The answer of the defendant- Nelson and Adams was served on the first day of April, 1895. The plaintiff appeared by Kellogg, Rose and Smith as his attorneys, the defendants Nelson and Adams appeared by James M. Smith as their attorney. The action was tried on the 20th day of February, 1896, before Mr. Justice Beekman, at special term. His decision in favor of the plaintiff and his opinion and defendant' exceptions and notice of appeal to the appellate division and the evidence and exhibits are hereinafter set forth.

2 The original parties to the action were Dennis Moloney, plaintiff, and Samuel Nelson, Albert J. Adams, Mary Adams, Frederick J. Middlebrook, Peter Loringet, McCoskry Butt, Annie E. Crump, The Mutual Life Insurance Company, and Jefferson M. Levy, defendants. There has been no change of parties except that the plaintiff by consent discontinued the action against defendants Middlebrook and Mutual Life Insurance Co. who were not necessary parties, which appears in the judgment-roll. So much of the judgment-roll as brings up the questions to be reviewed appears in the case as follows :

3 *Pleadings.*

Supreme Court of the State of New York.

DENNIS MALONEY, Plaintiff, *against* SAMUEL NELSON, ALBERT J. ADAMS, and Mary Adams, His Wife, the Name "Mary" Being Fictitious, the True Name of said Mary Adams Being Unknown to the Plaintiff; Frederick J. Middlebrook, Peter Loringet, McCoskry Butt, Anne E. Crump, The Mutual Life Insurance Company, and Jefferson M. Levy, Defendants.	Trial Desired to be Had in the City and County of New York. Summons.

To the above-named defendants and each of them:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated New York, January 28th, 1895.

KELLOGG, ROSE & SMITH,
Plaintiff's Attorney-.

Office and post-office address, No. 120 Broadway, New York city.

4 Supreme Court of the State of New York, City and County of New York.

DENNIS MOLONEY *against* SAMUEL NELSON, ALBERT J. ADAMS, and MARY ADAMS, His Wife, the Name "Mary" Being Fictitious, the True Name of said Mary Adams Being Unknown to the Plaintiff; Frederick J. Middlebrook, Peter Loringet, McCoskry Butt, Anne E. Crump, The Mutual Life Insurance Company of New York, and Jefferson M. Levy.

The plaintiff by this his complaint respectfully states to this court, upon information and belief:

That the above-named defendants, Samuel Nelson, for the purpose of securing the payment to the above-named plaintiff of the sum of ten thousand dollars on or about the 16th day of October, one thousand eight hundred and ninety-one, executed and delivered to the above-named plaintiff a bond bearing date on that day, sealed with his seal, whereby the said defendant, Samuel Nelson, bound himself, his heirs, executors and administrators in the penalty of

ten thousand dollars, upon condition that the same should be void if one Thomas O'Brien, for whose appearance to answer a certain charge of grand larceny this plaintiff and the defendant Nelson became bound as sureties, should appear to answer a charge of grand larceny made against said O'Brien in whatever court he should be prosecuted for said crime, and should at all times render himself amenable to the orders and process of the court in which he should be called upon to appear and answer, and if convicted should appear for judgment and render himself in execution thereof, pursuant to a certain bail bond given to the people of the State of New York, at the city of Albany, on the 16th day of October, 1891, and as collateral security for the payment of the said obligation, the said Samuel Nelson on the same day executed, duly acknowledged and delivered to the said Dennis Moloney, the plaintiff in this action, a mortgage whereby he granted, bargained and sold to the said Dennis Moloney, the plaintiff in this action, the following-described premises, with the appurtenances thereto, that is to say; All that lot of land in the city of New York bounded as follows: Beginning at the corner formed by the intersection of the southerly side of 131st street with the westerly side of Tenth avenue, running thence southerly along the westerly side of said Tenth avenue twenty-four feet eleven inches, thence westerly parallel with 131st street one hundred feet, thence northerly parallel with Tenth avenue twenty-four feet eleven inches to the southerly side of 131st street, and thence easterly along the southerly side of 131st street one hundred feet to the point of beginning be the same more or less.

Also all that certain other lot of land in the city of New York situated on West Fifty-second street and known and designated as street number 416, being on the south side of Fifty-second street and between Ninth and Tenth avenues, which said last-mentioned lot is described as follows:

Beginning at a point on the southerly side of West Fifty-second street distant two hundred feet westerly from the westerly side of Ninth avenue, running thence southerly parallel to Ninth avenue one hundred feet five inches, running thence westerly parallel to Fifty-second street twenty-five feet, running thence northerly again parallel to Ninth avenue one hundred feet five inches to the said southerly side of Fifty-second street, running thence easterly and along said southerly side of Fifty-second street twenty-five feet to the point or place of beginning, with a proviso in substance the same as the condition of the said bond, and with power and authority to the plaintiff in case of default in the conditions named in said bond, or any of them, to sell the said mortgaged premises in due form of law, and out of the moneys arising from the sale thereof, to pay the said sum of money, with the costs and expenses of the proceedings thereupon rendering the overplus, if any, to the said Samuel Nelson.

And the plaintiff further states that the said mortgage was duly recorded in the office of the register of the county of New York, on the 17th day of October, one thousand eight hundred and ninety-

one, in Liber 8 of Mortgages, page 17, &c., in the New York City block system of recording.

And the said plaintiff further states that the said defendant has failed to comply with the condition of the said bond and mortgages as follows:

That before the making and execution of said bond and mortgage, the said Thomas O'Brien had, as principal, entered into a recognizance to appear and answer a charge and indictment of grand larceny in whatever court it might be prosecuted, and should at all times render himself amenable to the orders and process of the court.

That thereafter, and at a term of the court of sessions, held in and for the said county of Albany on the 2d day of November, 1891, which said court of sessions had jurisdiction of said charge and indictment against said Thomas O'Brien, and was a court, where under said recognizance said Thomas O'Brien was to appear and answer, the said Thomas O'Brien failed to appear and
7 answer the said charge and indictment, when required, and failed to obey the orders and process of such court, and failed to hold himself amenable to the orders and process of such court, and the said recognizance was thereupon declared forfeited.

That thereafter, and before the commencement of this action, an action was commenced by the people of the State of New York against this plaintiff and the defendant Samuel Nelson, to recover the sum of $10,000 and interest, the amount of the bail bond entered into by this plaintiff and the said defendant Nelson, or the release of the said Thomas O'Brien.

That thereafter, and on the 8th day of December, 1891, a judgment was entered in the said last-mentioned action against this plaintiff and the defendant Nelson for the sum of $10,027.13.

That thereafter, and on or about the 30th day of April, 1892, an execution against the property of this plaintiff and the defendant Samuel Nelson was issued to the sheriff of the county of Albany, wherein and whereby the said sheriff was directed to levy and collect the sum of $10,027.13 with interest from the 8th day of December, 1891, and by virtue thereof, the property of this plaintiff was levied upon by the said sheriff, and there was paid by this plaintiff on the 9th day of January, 1893, and prior to the commencement of this action on account of the said execution the sum of $9,536.05.

That thereafter, and on the 14th day of April, 1893, another execution on the said judgment was issued to the sheriff of Albany county, wherein and whereby the said sheriff was directed to levy and collect the further sum of $1,263.14 with interest from the 20th day of March, 1893.

That pursuant to the said execution the property of this plaintiff was levied upon by the said sheriff, and there was paid by this plaintiff prior to the commencement of this action in satisfac-
8 tion of the said execution the sum of $1,263.14 with interest from the 20th day of March, 1893.

That the said defendant Samuel Nelson, has failed to indemnify and save harmless this plaintiff against loss and damage on the said

bail bond as agreed by him, and has failed to pay either any part of the said bail bond entered into by him with the people of the State of New York, or to pay to this plaintiff any part or portion of the said sums above mentioned so paid by this plaintiff under the said execution issued upon the said judgment, whereby there was a breach of the condition of the said bond given by said Nelson to this plaintiff, and there is now justly due to the plaintiff upon the said bond and mortgage the sum of $10,000 and interest.

And the plaintiff further states that no other action or proceeding has been had at law or otherwise to his knowledge or belief for the recovery of the said sum secured by the said bond and mortgage or any part thereof.

And the plaintiff further says, that he is informed and believes, and therefore states that the defendants Albert J. Adams and Mary Adams, Frederic J. Middlebrook, Peter Loringet, McCoskry Butt, Anna E. Crump, The Mutual Life Insurance Company of New York and Jefferson M. Levy, have or claim to have some interest in or lien upon the said mortgaged premises or some part thereof which interest or lien if any, has accrued subsequently to the lien of the said mortgage.

The plaintiff therefore demands that the defendant Samuel Nelson and all persons claiming under him subsequent to the filing of a notice of the pendency of this action in the office of the clerk of the county in which the said mortgaged premises are situated, may be barred and foreclosed of all right, claim, lien and equity of redemption in the said mortgaged premises; that the said premises may be decreed to be sold according to law; that the moneys
9 arising from the sale may be brought into court; that the plaintiff may be paid the amount due on the said bond and mortgage with interest to the amount of such moneys properly applicable thereto will pay the same; that the defendant Samuel Nelson, may be adjudged to pay any deficiency which may remain after applying all of said moneys so applicable thereto; and that the plaintiff may have such other or further relief or both in the premises as shall be just and equitable.

KELLOGG, ROSE & SMITH,
Plaintiff's Attorneys, 120 *Broadway, N. Y. City.*

COUNTY OF ALBANY, *ss:*

Dennis Moloney, being duly sworn, says, that he is the plaintiff in this action. That he has read the foregoing complaint, and that the same is true to his own knowledge, except as to the matters which are therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

DENNIS MOLONEY.

Sworn to before me, this 28th day of January, 1895.

[L. S.] ROB'T I. GETTY,
Notary Public, Albany Co., N. Y.

10 In the Circuit Court of the United States for the Southern District of New York.

DENNIS MOLONEY, Plaintiff,
against
SAMUEL NELSON and Others, Defendants.

The separate answer of the defendant, Samuel Nelson, to the complaint by James M. Smith, defendant's attorney, shows to the court:

First. That on or about the 21st day of November, 1891, the plaintiff commenced an action in the supreme court in the county of New York, against the above-named defendant and Albert J. Adams, and Mary Adams, his wife, and others, for the foreclosure of this identical mortgage described in the complaint in this action upon the same cause of *cause of* action as is herein, in said complaint alleged to which complaint this defendant Nelson and said Adams interposed a separate answer, and that since said answer of Adams was interposed, and before the commencement of this action, the said Adams sold said property and has no interest therein.

Second. That the issue joined in said action came on for trial at a special term of this court on the 25th day of January, 1893, and resulted in findings in favor of plaintiff, upon which on the 23d day of February, 1893, a judgment was rendered upon said cause of action in favor of the plaintiff directing the sale of said
11 mortgaged premises. That from such judgment an appeal was duly taken by this defendant to the general term of the supreme court of the first judicial district. That said cause was duly heard before said court, who after such hearing, made the following order: "Ordered that said judgment appealed from be, and the same is hereby reversed and a new trial ordered with costs to the appellant to abide the event of the action," and upon such decision judgment was duly entered, to which record this defendant refers as part of his answer.

Third. That after the rendition of the judgment and on or about the 25th day of August, 1893, the said plaintiff appealed from the said order and judgment of reversal of the said general term, and each and every part thereof to the court of appeals, of the State of New York, which notice of appeal contained the following stipulation: "And the above-named plaintiff and appellant hereby stipulates and agrees that, if said order of the general term hereby appealed from (meaning the said order granting a new trial and the said judgment of reversal) be affirmed, judgment absolute shall be rendered against the plaintiff in favor of the above-named defendant and respondent," to the record of which stipulation this defendant refers as part of his answer.

Fourth. That subsequently the said case on appeal was duly argued before said court of appeals, which said court of appeals affirmed the said judgment of the general term, and ordered judgment absolute against the plaintiff on the stipulation, and sent its

remittitur to the said supreme court to the record of which this defendant refers as part of his answer, a copy of which is hereto annexed, marked Schedule "A," and thereupon said judgment was on the 22d day of January, 1895, duly made the judgment of said supreme court.

12 *Fifth.* For a further and separate defense this defendant says, that on or about the 10th day of October, 1891, he executed and delivered to the plaintiff, or to the plaintiff's attorney, a bond and mortgage, a copy of which bond is hereto annexed, marked Schedule B, which forms part of this answer, which are the same bond and mortgage described in the complaint.

Sixth. This defendant, on information and belief, admits that said mortgage was recorded as stated and set forth in the complaint.

Seventh. This defendant admits that the said Thomas O'Brien, as principal, entered into a recognizance to appear and answer a charge of grand larceny at the time and place stated in the complaint.

Eighth. This defendant denies that there is now justly due to the plaintiff the sum of ten thousand (10,000) dollars, or any sum upon said bond and mortgage given by him to the plaintiff.

Ninth. For a further and separate defense herein this defendant repeats all the foregoing averments herein, and further says that, previous to the execution of the bond and mortgage hereinbefore referred to, he was solicited by said O'Brien, who was then under a charge of crime, to become one of his bondsmen; that two bondsmen were required upon a recognizance in order to procure the release of said O'Brien from prison. That said defendant consented to become one of the bondsmen. That said plaintiff agreed to become the other bondsman, and that both plaintiff and the defendant entered into said recognizance. That plaintiff received for so doing the sum of one thousand (1,000) dollars.

That, after the said recognizance was executed, the said

13 O'Brien was released from prison, and after such release this defendant executed and delivered the said bond and mortgage, without receiving any consideration for so doing.

Tenth. This defendant, further answering, says that he has no knowledge or information sufficient to form a belief as to whether or not the plaintiff has paid upon the said judgment rendered against plaintiff and this defendant upon said recognizance, all or any part thereof.

Eleventh. That, on or about the 16th day of November, 1891, an action was commenced in the supreme court to recover the amount of said recognizance. That such action was brought by The People of the State of New York, plaintiff, against Thomas O'Brien, Samuel Nelson, the defendant, and Dennis Moloney, the plaintiff in this action.

Twelfth. The defendant further says he received no consideration for said bond and mortgage. That since the same was executed by him he has been advised and believes that contracts indemnifying bail in criminal cases are illegal, and against public policy, and that said bond and mortgage are therefore void.

Wherefore, this defendant demands judgment that said complaint be dismissed with costs.

JAMES M. SMITH,
Attorney for Defendant Nelson.

Office and post-office address, 280 Broadway, New York city.

CITY AND COUNTY OF NEW YORK, *ss:*

Samuel Nelson, being duly sworn, says that he is the defendant in the above-entitled action; that he has read and knows the
14 contents of the foregoing answer; that the same is true to his own knowledge, except as to the matters which are therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

SAMUEL NELSON.

Sworn to before me, this 1st day of April, 1895.

F. J. BISCHOFF,
Notary Public, New York County.

In the Circuit Court of the United States for the Southern District of New York.

DENNIS MOLONEY, Plaintiff,
against
ALBERT J. ADAMS, Impleaded with SAMUEL NELSON and Others, Defendants.

The separate answer of Albert J. Adams to the complaint of Dennis Moloney, plaintiff, shows to the court:

First. That in the month of November, 1891, he purchased of said defendant, Samuel Nelson, property which defendant believes is correctly described in the complaint in this action.

Second. That subsequent to the purchasing this defendant
15 discovered that there was a *lis pendens* filed that affected said premises, and, after ascertaining such facts, the said purchase was cancelled and this defendant executed and delivered a deed thereof in fee-simple at the request of defendant Nelson — the said premises to a person by the name of Mead, but the full name this defendant does not recollect, for said sale and conveyance last stated was made before the filing of the *lis pendens* in this action.

Third. That this defendant has no interest in the property referred to in this action.

Wherefore, this defendant prays that said complaint be dismissed as to him, with costs.

JAMES M. SMITH,
Attorney for Defendant Adams; Office and Post-office Address, 280 Broadway, N. Y. City.

CITY AND COUNTY OF NEW YORK, *ss:*

Albert J. Adams, being duly sworn, says he is the defendant making the foregoing answer; he has read and knows the con-

tents of the foregoing answer, and that the same is true of his own knowledge, except as to the matters which are therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

ALBERT J. ADAMS.

Sworn to before me, this 30th day of March, 1895.

F. J. BISCHOFF,
Notary Public, New York County.

16 *Judgment-roll.*

Entered May 2d, 1896.

Contains all of the judgment-roll that is necessary to raise the only questions material on this appeal.

Supreme Court of the State of New York, City and County of New York.

DENNIS MOLONEY
against
SAMUEL NELSON, ALBERT J. ADAMS, and MARY ADAMS, His Wife; Frederick J. Middlebrook, Peter Loringet, McCoskry Butt, Annie E. Crump, The Mutual Life Insurance — of New York, and Jefferson M. Levy. } Decision.

In this action tried before me without a jury at a special term, part IV, of this court at the court-house in the city of New York, on the 20th day of February, 1896, I do make and file the following decision; stating concisely the grounds upon which the issues have been decided:

I do find that in the month of October, 1891, one Thomas O'Brien was under arrest and confined in Albany county jail, charged with the crime of grand larceny in the first degree, and that on the 16th day of October, 1891, he was discharged from custody on
17 giving a certain bail bond or recognizance in the sum of ten thousand dollars executed by himself, the defendant, Samuel Nelson, and the plaintiff, Dennis Moloney, conditioned that the said Thomas O'Brien should appear and answer the said charge in whatever court it may be prosecuted.

That the defendant, Samuel Nelson, in order to induce the plaintiff to enter into said recognizance, agreed to indemnify him against liability thereunder, and the plaintiff relying upon said agreement and not otherwise entered into and executed the same as aforesaid and the said defendant, Samuel Nelson, immediately thereafter and in fulfillment of said agreement did execute and deliver to the plaintiff, Dennis Moloney, the bond and mortgage set up in the complaint in this action, which said mortgage was thereafter and on the 17th day of October, 1891, duly recorded in the office of the register of the city and county of New York.

That thereafter and on the 2d day of November, 1891, the said

Thomas O'Brien was called upon in the county court of Albany county to appear and answer the indictment above referred to, but did not appear and the bail bond or recognizances executed by said O'Brien, the plaintiff Dennis Moloney, and the defendant Samuel Nelson, was, on said 2d day of November, 1891, declared forfeited.

That thereafter and before the commencement of this action, an action was brought by the people of the State of New York against the plaintiff, Dennis Moloney, and the defendant, Samuel Nelson, to recover upon said forfeited bail bond or recognizance, and on the 8th day of December, 1891, judgment in said action was duly entered in favor of the People of the State of New York against the defendant, Samuel Nelson, and the plaintiff, Dennis Moloney, for the sum of ten thousand and twenty-seven $\frac{13}{100}$ ($10,027.13) dollars, and the judgment-roll duly filed in the office of the clerk of Albany county on said date.

18 That thereafter executions upon said last-mentioned judgment were duly issued to the sheriff of Albany county, and the plaintiff's property was sold under said execution, and the entire amount of said judgment paid wholly by the plaintiff.

That no part of the sum of ten thousand dollars secured by said bond and mortgage has been paid to the plaintiff and defendants agreed and consented on the trial of this action that interest upon said sum of ten thousand dollars should be computed from the 5th day of June, 1893.

I do therefore decide as follows:

That there is due on the bond and mortgage mentioned and described in the complaint in this action the sum of ten thousand dollars with interest from June 5th, 1893, amounting to this date to the sum of seventeen hundred and seventy-six $\frac{65}{100}$ dollars and together the sum of eleven thousand seven hundred and seventy-six $\frac{65}{100}$ dollars and that plaintiff is entitled to the usual judgment of foreclosure and sale of the premises mentioned in the complaint for the said sum of eleven thousand, seven hundred and seventy-six $\frac{65}{100}$ dollars together with the costs and disbursements of this action and an allowance of two hundred ($200) dollars in addition to costs, and I do also decide the defendant Samuel Nelson shall be adjudged to pay any deficiency that may arise on the sale under foreclosure. Judgment entered accordingly.

Dated New York, May 1st, 1896.

HENRY R. BEEKMAN, *J. S. C.*

19 At a special term of the supreme court of the State of New York, held at the court-house, in the city and county of New York, on the 1st day of May, 1896.

Present: Hon. Henry R. Beekman, justice.

DENNIS MOLONEY, Plaintiff,
against
SAMUEL NELSON, ALBERT J. ADAMS, and MARY ADAMS, His Wife; Frederick J. Middlebrook, Peter Loringet, McCoskry Butt, Annie E. Crump, The Mutual Life Insurance Company of New York, and Jefferson M. Levy, Defendants. } Judgment.

On the summons and complaint duly filed in this action, and all proceedings thereon and on reading and filing the affidavit of Arthur H. Smith, one of the plaintiff's attorneys and notices of appearance, showing that each and all of the defendants herein have been duly personally served within this State with the summons in this action, or have voluntarily appeared therein by their respective attorneys except the defendant Annie E. Crump, who has not been served; and on due notice of trial of this action, with proof of service thereof by admission of defendants' attorneys; and on the decision made and filed herein by the justice before whom this action was tried; and on reading and filing the affidavit of Arthur H. Smith one of the attorneys for the plaintiff, proving that more than twenty days had elapsed since said defendants were
20 so served and appeared as aforesaid that defendants Samuel Nelson and Albert J. Adams, Frederick J. Middlebrook and The Mutual Life Insurance Company of New York answered and that the other defendants have not served any answer or demurrer to said complaint, and that the action has been discontinued as to the defendants Middlebrook and Mutual Life Insurance Company, and that the defendant Annie E. Crump is not a necessary party to this action; and that due notice of the pendency of this action was duly filed in the office of the clerk of the city and county of New York on the 31st day of January, one thousand eight hundred and ninety-five, and at the time of filing the complaint, and the trial court having found and decided that the amount due to the plaintiff upon the bond and mortgage set forth in the complaint as appears by the said decision of the justice before whom this action was tried on the 1st day of May, 1896, — the sum of eleven thousand seven hundred and seventy-six $\frac{65}{100}$ dollars, and that the plaintiff was entitled to a decree of foreclosure and sale of said premises to pay the amount due to the plaintiff with interest and costs and expenses.

Now, on motion of Kellogg, Rose & Smith, attorneys for the plaintiff,

It is ordered, adjudged and decreed that this action be discontinued as to the defendant- Frederick J. Middlebrook, The Mutual Life Insurance Company and Annie E. Crump, and that the mortgaged premises described in the complaint in this action as hereinafter set forth, or such part thereof as is sufficient to discharge the mortgage debt, the expenses of the sale and the costs of the action as provided by section 1626 and section 1676 of the code, and which may be sold separately without material injury to the parties interested, be sold at public auction at the Real Estate exchange in the

city and county of New York by or under the direction of
21 Samuel H. Ordway, Esq., referee; that the said referee give public notice of the time and place of such sale, according to law and the rules and practice of this court; that either or any of the parties to this action may purchase at such sale; that the said referee execute to the purchaser or purchasers a deed or deeds of the premises sold; that out of the proceeds of the sale he pay the expenses of the sale as provided in section 1676 aforesaid, and that the said referee pay to the plaintiff or his attorneys the sum of two hundred and seventy-nine $\frac{63}{100}$ dollars adjudged to the plaintiff for costs and disbursements in this action, with interest thereon from the date hereof, together with an additional allowance of two hundred dollars, and also the said amount so reported due as aforesaid, together with the legal interest thereon from the date of the said decision or so much thereof as the purchase-money of the mortgaged premises will pay of the same, take a receipt therefor, and file it with his report of sale; that he deposit the surplus moneys (if any) with the chamberlain of the city of New York (within five days after he receives the same) to the credit of this action, to be drawn only on the order of the court signed by a justice of the court; and that he make a report of such sale and file it with the clerk of the city and county of New York with all convenient speed; that if the proceeds of such sale be insufficient to pay the amount so reported due to the plaintiff with interests, costs, allowance and expenses of sale as aforesaid, the said referee specify the amount of such deficiency in his report of sale, and that the defendant, Samuel Nelson, pay the same to the plaintiff, and that said plaintiff have execution therefor; and that the purchaser or purchasers at such sale be let into possession on production of the referee's deed or deeds.

And it is further ordered, adjudged and decreed, that each
22 and all of the defendants in this action, and all persons claiming under them, or any or either of them, after the filing of such notice of pendency of this action, be and they are, hereby forever barred and foreclosed of all right, claim, lien, title, interest and equity of redemption in the said mortgaged premises and each and every part hereof.

The following is a description of the said mortgaged premises hereinbefore mentioned:

All that lot of land in the city of New York bounded as follows: Beginning at the corner formed by the intersection of the southerly side of *of* 131st street with the westerly side of Tenth avenue, running thence southerly, along the westerly side of Tenth avenue, twenty-four feet eleven inches; thence westerly parallel with 131st street, one hundred feet; thence northerly, parallel with Tenth avenue, twenty-four feet eleven inches, to the southerly side of 131st street, one hundred feet to the point of beginning, be the same more or less.

Also all that certain other lot of land in the city of New York, situated on West Fifty-second street, and known and designated as street number 416, being on the south side of Fifty-second street,

and between Ninth and Tenth avenues, which said last-mentioned lot is described as follows:

Beginning at a point on the southerly side of West Fifty-second street, distant two hundred feet westerly from the westerly side of Ninth avenue; running thence southerly, parallel to Ninth avenue, one hundred feet five inches; running thence westerly, parallel to Fifty-second street, twenty-five feet; running thence northerly, again parallel to Ninth avenue, one hundred feet five inches to the said southerly side of Fifty-second street; running thence easterly and along said southerly side of Fifty-second street, twenty-five feet to the point or place of beginning.

Enter.

HENRY R. BEEKMAN, *J. S. C.*

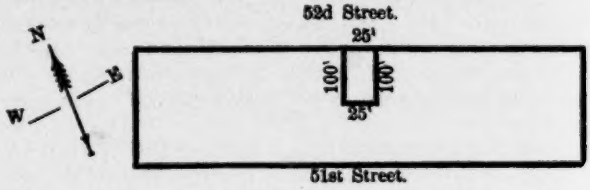
23 The clerk of the city and county of New York, will please search in his office for judgments and decrees and also transcript of judgments and decrees from all courts against the following:

Samuel Nelson, from October 31st, 1891, to date of return.

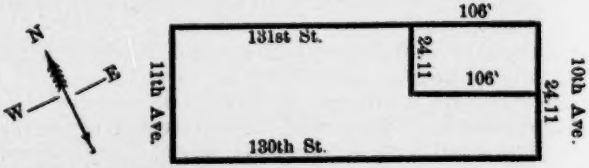
Albert J. Adams, from October 31st, 1891, to date of return.

Also for surrogate's decrees and forfeited recognizances against the same person- for the same periods.

Also for mechanics' liens affecting property south side of 52d street for one year last past.



Also for mechanics' liens affecting south side of 131st street, for one year last past.



Also for notices of *lis pendens.*

" certificate of sheriff's and marshal's sales.

" insolvent assignments.

" general assignments.

" foreclosures by advertisements.

" appointment of receivers.

" against the persons following, for the following periods respectively:

24 Samuel Nelson, from Oct. 31st, 1891, to date of return.
Albert J. Adams, from Oct. 3d, 1891, to date of return.

For KELLOGG, ROSE & SMITH,
120 *Broadway, New York.*

Supreme, Albany Co., 1891, Dec. 9.

SAMUEL NELSON and DENNIS MOLONEY *ads.* } $10,027.13.
THE PEOPLE OF THE STATE OF NEW YORK.

Andrew Hamilton, att'y.

Lis Pendens.

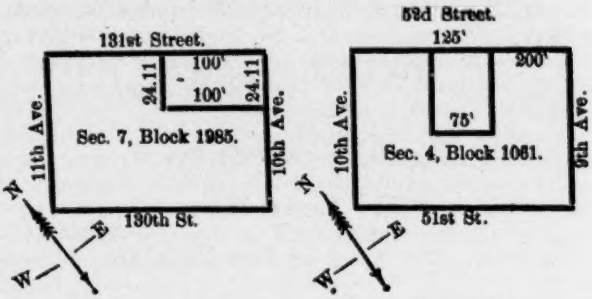
Samuel Nelson *et al., ads.*
1891, Nov. 23. Dennis Moloney.
Albert J. Adams *et al., ads.*
1891, Nov. 23. Dennis Moloney.
1893, Oct. 10. Frederic J. Middlebrook.
1894, May 19. Peter Loringet.
" Nov. 3. Albert J. Adams.
" Dec. 24. McCoskry Butt.
1895, Jan. 11. Anna E. Crump.
" Jan. 12. The Mutual Life Ins. Co. of New York.
" Jan. 21. Jefferson M. Levy.
Nothing else found to Jan'y 29, '95, 9 a. m.
$4.00
2.00

$6.00

HENRY D. PURROY, *Co. Clerk.*

The register of the city and county of New York, will please search for conveyances, mortgages, leases, agreements to sell, and all other instruments in writing and incumbrances of record in his office upon, of, or affecting the title to the following-described
25 premises, or any part thereof, by the following-named persons, and for the periods set opposite to their names respectively, and certify the result in writing for

KELLOGG, ROSE & SMITH,
120 *Broadway, New York City.*



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against

Samuel Nelson, from October 31st, 1891, to date of return.

Albert J. Adams, from October 31st, 1891, to date of return.

Samuel Nelson to Albert J. Adams, deed dated Nov. 10, 1891, rec'd Nov. 10, 1891, in section 7, Liber 4 of Cons., p. 281.

Same to same, deed dated Nov. 10, 1891, rec'd Nov. 10, 1891, in section 4, Liber 5 of Cons., p. 263.

See agreement to extend rec'd in section 4, Liber 38 of Morts., p. 75.

Nothing else found, January 29, 1895, 9 a. m.

Witness my hand and official seal.

[SEAL.] JOHN VAN GLAHN,
Deputy Register.

Nothing else found, April 3, 1895, 9 a. m.

Witness my hand and official seal.

[SEAL.] JOHN VAN GLAHN,
Deputy Register.

26 Supreme Court of the State of New York, City and County of New York.

DENNIS MOLONEY
against
SAMUEL NELSON, ALBERT J. ADAMS, and Mary Adams, His Wife, the Name "Mary" Being Fictitious, the True Name of said Mary Adams Being Unknown to the Plaintiff; Frederick J. Middlebrook, Peter Loringet, McCoskry Butt, Anne E. Crump, The Mutual Life Insurance Company of New York, and Jefferson M. Levy.

The *Lis Pendens* was Filed in the Office of the Clerk of the City and County of New York on the 31st Day of January, 1895.

To all of the above-named defendants, except Samuel Nelson and Albert J. Adams:

Please take notice, that the object of this action, in which a summons is herewith served upon you, is brought to foreclose a mortgage executed by Samuel Nelson to Dennis Moloney, dated the 16th

day of October, 1891, for ten thousand ($10,000) dollars, with interest, which mortgage was recorded in the office of the register of the county of New York, on the 17th day of October, 1891, in Liber 8 of Mortgages, p. 17, in the New York city block system of recording.

The premises in question are described in the complaint as follows:

All that lot of land in the city of New York bounded as follows:

27 Beginning at the corner formed by the intersection of the southerly side of 131st street with the westerly side of Tenth avenue, running thence southerly along the westerly side of Tenth avenue twenty-four feet eleven inches; thence westerly, parallel with 131st street, one hundred feet; thence northerly, parallel with Tenth avenue, twenty-four feet eleven inches to the southerly side of 131st street, and thence easterly along the southerly side of 131st street, one hundred feet to the point of beginning be the same more or less.

Also all that certain other lot of land in the city of New York situated on West Fifty-second street, and known and designated as street number 416, being on the south side of Fifty-second street, and between Ninth and Tenth avenues, which said last-mentioned lot is described as follows:

Beginning at a point on the southerly side of West Fifty-second street, distant two hundred feet westerly from the westerly side of Ninth avenue, running thence southerly, parallel to Ninth avenue, one hundred feet five inches; running thence westerly, parallel to Fifty-second street, twenty-five feet; running thence northerly, again parallel to Ninth avenue, one hundred feet five inches to the said southerly side of Fifty-second street; running thence easterly and along said southerly side of Fifty-second street, twenty-five feet to the point or place of beginning.

No personal claim is made against you in this action.

Dated New York, January 31st, 1895.

KELLOGG, ROSE & SMITH,
Attorneys for the Plaintiff, 120 *Broadway, New York City.*

28 The case came on for trial before Mr. Justice Beekman in part IV, special term, on the 20th day of February, 1896.

Mr. L. Laflin Kellogg and Arthur H. Smith appeared for the plaintiff.

Mr. James M. Smith and William H. Newman appeared for the defendant, Nelson.

Mr. James M. Smith, defendants' counsel, states to the court as follows:

I want it to appear upon the record that I interpose the objection that the court of appeals decision in the case is an absolute bar to this action, and that a judgment has been rendered upon the very cause of action which is sought to be recovered upon in this action.

The COURT: It forms part of the defendants' case, and the question therefore can only be raised upon the proofs submitted in ex-

planation of the defense, under which the defendant has pleaded the judgment in the case that was before the court of appeals as a bar to this suit.

Defendent excepted.

Plaintiff's counsel offered in evidence bond from Samuel Nelson to plaintiff, dated October 16th, 1891. Ex. A.

Also mortgage to secure bond. Exhibit B.

Also bench warrant in the case of The People against Thomas O'Brien, dated September 25th, 1891. Ex. C.

Also the recognizance after indictment of said O'Brien in which plaintiff and defendant were the sureties. Ex. D.

Also order of the court of sessions of Albany in same case, dated November 2d, 1891. Ex. E.

Also judgment-roll in supreme court in case of the People, &c., against plaintiff and defendant for $10,027.13, filed in the office of the clerk of Albany county, December 8th, 1891. Ex. F.

29 Also execution issued on that judgment to sheriff of Albany county, against plaintiff and defendant dated April 29th, 1892, and returned June 5th, 1893, marked, "Satisfied for $9,536.05." Marked Ex. G.

Also further execution in same judgment to same sheriff, returned June 5th, 1893, with the endorsement thereon "Satisfied in full for $1,263.14" and filed in Albany county clerk's office June 5th, 1893. Ex. H.

By consent of counsel either party was allowed to read in evidence the testimony of the witnesses taken on the former trial from the printed case on appeal to the court of appeals in case of Moloney *vs.* Nelson. Under which stipulation plaintiff's counsel read the testimony of George Sweeley, as follows:

GEORGE SWEELEY, a witness for the plaintiff, being duly sworn, testifies:

I reside at 408 Elk street, Albany, New York. My business at the present time is day watchman at the jail. In October, 1891, I was jailer of Albany county jail. I know one Thomas O'Brien. At that time I had him, as such jailer, in my custody. I have the bench warrant in my possession. On the 16th of October, 1891, between the hours of two and three, I took O'Brien to Judge Clute's office in the Tweedle building; he is county judge of Albany county. I recognize that paper shown. I saw it signed by Thomas O'Brien and Samuel Nelson and Dennis Maloney. The signature on the jurat is Judge Clute's. It was acknowledged on the 16th of October, three o'clock in the afternoon, on the occasion I have spoken of at Judge Clute's office.

Q. What was done with O'Brien after that paper was signed?

A. I had a bench warrant and Judge Clute admitted him to bail in the sum of $10,000, and that released my authority.

30 Q. O'Brien was discharged from custody?

A. Yes, sir.

Q. And is the endorsement on there from Judge Clute?

A. Yes, sir.

Defendant's counsel read the cross-examination as follows:

Cross-examination by Judge SMITH:

I took O'Brien before Judge Clute some time between two and three o'clock. Seen Mr. Nelson there, Mr. Maloney, District Attorney Hamilton, Judge Clute and several other people in the office; I cannot remember all. I took O'Brien out of prison some time between two and three o'clock. I went immediately from the prison to Judge Clute. I could not tell exactly how long I was there; not very long. I don't think I stayed two minutes after that bond was signed. I immediately left. Judge Clute told Mr. O'Brien he was discharged, and that released me from duty. I think O'Brien came out with some friends about the same time. Not me and him personally, but I think we came right together; he came out with his friends and I came out alone. There was quite a little excitement there; I could not tell who was there; I left the judge there, the district attorney—they stayed behind. District Attorney Hamilton. I could not tell you who else.

Q. Did you leave Mr. Meegan?

A. Yes; I think so.

I think Mrs. Huntington was there, I am not going to be quite positive on that part; but I think she was. I didn't pay no particular attention as to anybody else. I saw Mr. Nelson there. I don't know who they all are. There was quite a number of people. I could not call them all by name.

Q. Did you stay until the bond and mortgage that has been spoken of here was executed?

A. I don't know anything about it.

31 Q. You saw Mr. Maloney there, didn't you?

A. Yes; the first time I ever did see him.

Plaintiff's counsel read the entire testimony of William J. Dunn, as follows:

WILLIAM J. DUNN, called as a witness for the plaintiff, being duly sworn, testifies:

By PLAINTIFF'S COUNSEL:

I reside at Albany, N. Y. At present I am doing nothing. My employment or official position in October, 1891, was deputy county clerk, in Albany county, of the supreme court and of the county court. I was present in court after the 16th of October, when the case of The People against O'Brien was called. I heard him called to answer an indictment. He did not appear.

Mr. SMITH, defendant's counsel:

Q. A record was made of what took place, was there not?

A Yes, sir; I have (papers produced by the witness). I will offer it in evidence.

Same received in evidence and is as follows:

"The People against Thomas O'Brien.—Thomas O'Brien the defendant, being called by the district attorney for trial, and neglecting to appear for trial after proclamation made, calling on said defendant to appear, and also upon his said sureties, Samuel Nelson and Dennis Maloney, to produce the said Thomas O'Brien, and the said Thomas O'Brien then neglecting to appear for trial, the court directed these facts to be entered upon its minutes, and the undertaking was finally declared void, and his bail declared forfeited, and the same was directed to be prosecuted according to law and
32 a bench warrant issued for the arrest of said defendant, Thomas O'Brien."

Dated November 2, 1891.

The recognizance given for his appearance was then forfeited.

DENNIS MALONEY, called on his own behalf, being sworn, testified as follows:

I reside in West Troy, Albany county. I am in the ice business at present, ice dealer. I lived in 1891 in West Troy. I am the Dennis Maloney who executed that paper (showing Exhibit D). I am the Dennis Maloney to whom was delivered this bond and mortgage. Exhibits A and B. I was afterward sued by the people of the State of New York to recover on the recognizance which I had executed.

DEFENDANT'S COUNSEL: We admit he is the same man.

I was present at the time of the sale under the executions against my property.

It is admitted that the property sold under these executions was the property of Dennis Maloney.

Q. Has any part of this $10,000 referred to in this bond and mortgage been paid to you?

A. No, sir.

It is agreed that June 5th, 1893, is the date from which interest may be calculated, and that the calculation may be made hereafter.

Defendant read the cross-examination of plaintiff as follows:

33 Q. Were you paid anything for going on the bond?

A. No, sir; not as I knew of. Mr. Meegan, a lawyer, gave me $1,000 after I went down to his office. Made me a present of $1,000 I suppose. I had known him before for about twenty years. Am no relation of his.

By the COURT:

Q. What was $1,000 given to you for?

A. I suppose Mr. Meegan gave me $1,000; he requested me to go on the bond.

Q. He gave you $1,000?

A. Yes, sir.

The COURT: I will find that he received $1,000 for going on that bond.

That was given in Mr. Meegan's office. I do not know who gave the money to Meegan to give to me. I never asked that question. I think it was about two o'clock when I signed the bond. After I signed the bond I got the money. It was about two hours. Nobody was present when I got the money.

Q. When was the mortgage signed?

A. What mortgage do you mean?

Q. The one that was given to you for $10,000.

A. I could not tell you.

Q. You don't know anything about it?

A. I don't know when it was signed.

Q. You was not there?

A. No, sir.

Q. At the time it was signed?

A. I didn't see it signed. I didn't see Mr. Nelson sign it.

Q. Mr. Nelson did not owe you any money, did he?

Objected to by plaintiff; objection sustained; exception by defendant.

Plaintiff rests.

34 Defendant's counsel read the testimony of Samuel Nelson, as follows:

SAMUEL NELSON, the defendant, called as a witness in his own behalf, being duly sworn, testifies:

I am the defendant in this action. I never met Maloney until that day; the first time I ever met him was in Albany. I met him with a gentleman here, Mr. Getty; me and Getty was out all night hunting for him, to go on the bond. This man went after him to go on this bond. I met him in a lawyer's named Meegan's office, in Albany. I went up there and asked for a friend of mine named McCormick—and I never was in Albany before. I met Getty and Maloney there, and Maloney and I and four or five other people went over to the court-house—the judge's office—and we went bonds for O'Brien for $5,000 apiece, and then when this had been done O'Brien was released; O'Brien, Maloney, Getty and I, we walked over to the lawyer's office. That is after I left Judge Clute's office; after O'Brien was out on bail. Then I went down to Mr. Meegan's office. Mr. Maloney was there.

Q. Tell what you said.

A. Meegan said, Where is this $1,100? I didn't know there was any money to be given at all, because we were on our oath; the judge asked us, and the district attorney asked, "Won't you swear that you were not to receive anything?"

Mr. Meegan asked, where is the $1,100? $1,100 was pulled out; Meegan took it, and he fetched this man Getty to where all of us was and says, Ladies and gentlemen, this is my assistant counsel; there is $100 for getting the bondsman. He gave it to Getty. Then

Meegan and Maloney, whatever money Maloney got, I see Meegan have it, and two of them put it down in their pocket; and Meegan says, Just wait a few moments, until I draw out a bond; it is only a mere matter of form; and the boys and Maloney walked;
35 all of us went out and had a drink; when I came back the paper was opened—foolscap paper; he said, Just sign that; it is only a mere matter of form; we had all been drinking, and I signed it, and I didn't know nothing about it or anything else until I was sued upon it here. I was by when money was handed to Maloney. Mr. Meegan gave him some money; I don't know what he gave him.

Q. You saw him hand him a roll of bills?

A. Yes; then Maloney came to my place next day; we had an appointment there with a man by the name of Dishler, O'Brien, Minshen and a lady, Mrs. Huntington, and they all met in the store in my place. Maloney said he knew the District Attorney Hamilton, since he, Hamilton, was a boy, and he commenced to talk about him very badly; he said he would take money as quick as anybody; and then he claimed he only got $500 out of it. He said if he could do anything at all for anybody up the State to come to him, that he had more property than that.

Mrs. Huntington and Mr. Minshen, and a man by the name of Adams and a man by the name of Dishler was present when that was said. Nothing was said when I signed this bond, as to what I would have to do or as to what I would be liable for. Nothing said on the subject. Only it was a mere matter of form, that is all. This man Getty, he *look* the acknowledgment; he asked me was that my signature; that is all ever I seen of Getty. I hadn't anything to do with him, never in my life.

Q. When you signed this bond and mortgage, was O'Brien about there, or had he left?

A. Yes, sir; he was around there drinking in the gin mills, and then he came back to the office.

Q. When you signed this bond and mortgage, was it after you had been before Judge Clute?

A. After; yes, sir.

Q. About how long after, Mr. Nelson?

A. I guess about three hours—a little over that.

36 Q. Did you receive any consideration for signing that bond?

A. No, sir.

Plaintiff's counsel read the cross-examination, as follows:

Cross-examination:

I live now at 270 West Thirty-third street. My business is liquor dealer. I went up to Albany at the request of a friend of mine, John McCormick; he lives in Fifty-ninth street now, I believe, in a hotel. It was that night—about the night before that I went up to Albany with reference to signing the bond. A lady by the name of Mrs. Huntington and Mr. Minshen went up with me. I don't know

where he lives—around the Bower house, I think. I don't know where he lives now. The State would like to get him. He was not a friend of mine. I never seen him until I seen him that night. He went up with me that night, and that lady, Mrs. Huntington. Dishler did not go up with me; he was up there. He did not meet me at the train. I first met him at the Delevan house. He lives in Utica. I never seen him in Utica. I first went to Mr. Meegan's office, about half past ten in the morning, to go bonds for O'Brien. Had known O'Brien a number of years. Had never been in business with him. Had business transactions with him. I was not on that occasion a comparative stranger to Mr. O'Brien. I knowed him by being a customer; keeping a public house—coming in and out. I did not know what he had been indicted for up there. Didn't hear till I got up there. They told me going up there.

Q. I thought you said you didn't know till you got up there?

A. Going up.

The gentleman that was with me and the lady told me.
37 Mrs. Huntington and Mr. McCormick. McCormick didn't go up with me. Mrs. Huntington and Minshen went up with me. Minshen told me of it. Had not been acquainted with Minshen long. Knew how he happened to go along with us. He had charge of the case. I don't know his business. I found that Mr. Meegan up there was Mr. O'Brien's lawyer. We went to his office about half past ten in the morning.

Q. When did you first learn the amount of the bond—how much the bond was?

A. $5,000 apiece.

Q. You never signed any bond except for $5,000?

A. That is all.

Q. You never signed any bond at all for $10,000?

A. No, sir; we signed it in Judge Clute's office.

Q. The only bond that you signed in Judge Clute's office was one for $5,000?

A. Yes, sir.

At the first interview at Mr. Meegan's office I then agreed to go on the bond. At the first time. Maloney and I went over together. It was in the afternoon then. At 10½ o'clock in the morning I went into Meegan's office. I then agreed to go on the bond. Did not know who was to go on the bond with me. I first learned that Maloney was to go on the bond with me right there and then, at the court-house, at two o'clock. From half past ten until I got before Judge Clute hadn't seen Maloney. I think I had seen Getty; I ain't sure. Didn't swear on my direct examination that I had had a talk with Getty at the first interview. No, sir—not about that bond. That was about half past three. That was after the bail bond had been signed and O'Brien had been released. That was the first that I saw Getty. And all that I saw of him was that he took my acknowledgment to a paper that I signed. Nobody was present at that time.

Q. Where was that paper signed—in Meegan's office? You and Getty were there alone?

38 A. Meegan was there.

Q. Didn't you swear, on your direct examination, that Maloney was present?

A. No—not when that bond was signed.

Q. You did so state?

A. No, I didn't.

Q. You gave a conversation that took place, and it was admitted because Maloney was present?

A. No, sir.

By the COURT:

Q. You say that Maloney was not present?

A. No, sir; he was not.

By Mr. ROSE:

Q. The first that you saw of Maloney was when you got to Judge Clute's office?

A. Yes, sir.

Maloney, O'Brien and I and two or three others went to Meegan's office. Maloney went into Meegan's office. As long as I stayed—that was all day, he was in my company all the time I was there. He was with the other company, too. All three were together. About half past four the bond and mortgage was signed, and I took the acknowledgment before Getty.

After O'Brien was released—we had been——

Q. How do you recollect that Maloney was not present when the bond and mortgage was signed, and that you went from Judge Clute's office down to Meegan's office and stayed in each other's company until you both left together?

A. They were going in and out; they may have been outside.

Q. You were not in and out at all?

A. Yes, sir; I was.

Q. But Maloney stayed there all the time in the office?

A. No; we were out, around the corner drinking. Mc-
39 Cormick came to me and asked me to go on the bond. McCormick knowed O'Brien. I don't know how he knew him. I had a little business connection with Mr. McCormick at that time.

Q. Didn't he give you some money to go on the bond?

A. No; we went up there—he sent for me and we went up there—and Meegan wanted $2,000 to settle the case; and he said if I didn't give it to him—and I took Mr. McCormick up with me—and he says, why——

Q. When was this?

A. This was about two weeks after the bond had been forfeited. The next morning after this mortgage was given I met Maloney; down at a store, no; I met O'Brien going out of a Friday night, and we had had an appointment Saturday night at my store. And Maloney came to New York. And Getty came down.

Q. And they met at your store?

A. No; we sent Getty home in a coach. Maloney came there to

my store, in New York. Mr. Adams was present. I don't know what he does. I never seen him before that day.

Q. Is he the one to whom you transferred this real estate?

A. I didn't transfer any real estate.

Q. Do you mean to say that you haven't sold this real estate since this bond was given?

A. I have sold it. Gave a deed for it to a man by the name of Adams, not this Mr. Adams. Another one. Albert Adams. Adams' name that I met there this morning was Charles Adams. I sold it, I guess, about three months after—two months after. I am sure of that. Yes, sir; they had to search title and everything; it took quite a while. I did not give Meegan the $1,000 or $1,100. I didn't give Maloney the $1,000. I didn't know it was going to be given.

I didn't give — to him. I didn't ask Maloney to go on the
40 bond. I never seen him. I never saw him until I got to Judge Clute's office.

Q. Is that your signature (handing same to witness)?

A. Yes.

Q. You signed that and swore to it?

A. I signed that in Meegan's office; the bond wasn't as big as that.

"Q. Is this your signature, and did you swear to it?

"A. I wouldn't swear that that is my signature.

"Mr. SMITH: That is a copy of a paper from my office; it is not the original.

"Mr. ROSE: Do you admit that the original answer was verified by this defendant personally?

"Mr. SMITH: I would rather not make any admission.

"Mr. ROSE: I ask them now to produce the original answer.

"The COURT: What do you want to show?

"Mr. ROSE: Statements in the answer contradictory to the statements of the witnesses here.

"The COURT: That this defendant paid the sum of $1,000?

"Mr. ROSE: Yes, sir, and other statements."

I have never been to Albany before in the matter of going bonds for O'Brien. On two or three trips I went up to see Meegan—he sent for me. That was after I signed this bond.

Q. The day that you signed the bond was the first day that you had been in Albany?

A. First day—no.

Q. You went up the night before?

A. I made two or three trips before that.

Q. Up to Albany?

A. Yes, sir.

Q. What did you go up there for?

A. For to go bonds for O'Brien.

Q. On the previous two or three trips?

A. Yes, sir.

41 Q. Didn't you say in court a little while ago that the first that you knew that O'Brien was indicted and the amount of

the bond was when Minshen told you the night of the day that you went to Albany?

A. No, sir; but he was not admitted to bail.

Q. Who was present when this money was paid over to Meegan—the $1,100?

A. Mr. Dishler, already mentioned and a man by the name of Lentler, Getty, Maloney, Mrs. Huntington, and myself.

Q. Where was it?

A. In Albany; in Meegan's office.

Redirect:

The kind of business I had with O'Brien was coming in and out of my place to get a drink. That is what I meant when I said that I had business with him, and when he would be a little intoxicated he would give me his money to mind for him.

By the COURT:

Q. Where was your place of business?

A. Thirty-third street and eighth avenue.

Redirect:

O'Brien was in the book-making business; what they call a book-maker; I had a safe in my store, and the money would be handed to me, and I would put it in the safe. I never had any other kind of business except that.

Defendant's counsel read the testimony of ANNIE HUNTINGTON, a witness for the defendant, as follows:

I was present in Albany on the day when O'Brien was released on bail. I was at the office of the attorney, Mr. Meegan; I
42 was present when Mr. Nelson signed the bond, not the bail bond; I was in Meegan's office after he was released; after Mr. O'Brien was released; immediately after the bond was signed by Mr. Nelson. Immediately after Mr. O'Brien was brought from the jail, after having been released on a bond, by Mr. Maloney, he was brought to Mr. Meegan's office, and Mr. Nelson signed some papers there, I don't know what it was, supposed to be a mere matter of form, I believe.

Q. Did they say it was a matter of form?

A. Yes, sir; it was something to satisfy Mr. Maloney.

Q. Who said that?

A. Mr. Meegan.

Q. Did you see any money paid?

A. Yes, sir.

Q. Who paid the money?

A. He, Meegan, paid some money, Mr. Dishler paid the other; the parties come in from the jail with Mr. O'Brien, Mr. Meegan, Mr. Maloney, Mr. Nelson, Mr. Dishler, and Mr. Minshen. I was sitting in the office waiting for them to come; they all came together, my present recollection is; I don't know whether it was Mr. Meegan or Mr. Dishler said, I suppose you want the money, your money, or

something to that effect. I think it was Mr. Dishler. Mr. Meegan said Yes. Mr. Dishler turned to Mr. Minshen; he (Mr. Minshen) handed the money; Mr. Dishler handed it to Mr. Meegan, and Mr. Meegan took two fifty-dollar notes—a hundred dollars—and held it in his hand, and walked to the door. I was sitting just inside the inner office. He held the money up like this (indicating), talking to Mr. Getty, who was in the inner office, and said, I want you all to see this is my assistant counsel, a thorough counsel; I want you all to see that he gets his money; I promised him a hundred dollars. We all saw that, and then he went out and was handling other money which Mr. Minshen had given Mr. Dishler.

43 Plaintiff's counsel read the cross-examination of the witness as follows:

I reside in New York, Forty-sixth street, No. 102; have been there three or four years; came up with Mr. Nelson to Albany on the night of the 15th of October; had been up with him before that three or four times; I went up and offered to go bail for Mr. O'Brien; that was rejected. Mr. Maloney was in Mr. Meegan's at the time that they were passing this money around; he had been in there; he was in the inner office. Maloney was in the inside office, the same office that I was in; they were all in and out; they were on the street and back in the inner office.

By the COURT:

Q. Did you see any money paid to Maloney?
A. It was paid to Meegan.
Q. Did you see any money handed to Mr. Maloney?
A. Not then.
Q. At any time?
A. No, not at any time; I met Mr. Maloney the next evening when he came to the store; he said he got $500 of it.

Defendant's counsel read on redirect the testimony as follows:

By Mr. SMITH:

Q. After O'Brien had been released on bail, did you have an interview with Mr. Maloney at Mr. Nelson's place of business?
A. I was present the next evening, Saturday evening, and they were all together.
Q. In that interview, will you please state to the court what Maloney said?
A. We were speaking about money, about giving $1,000; he said he got $500, which he had with him; that he hadn't made
44 mention of half of his property that he had, and was boasting how much he was worth.

Defendant's counsel offered in evidence the remittitur from the court of appeals in the case of Maloney against Nelson; the order of the supreme court, making it the judgment of the supreme court, and the judgment entered thereon by the clerk of the city and county of New York.

Papers marked Exhibit No. 1.

Defendant's counsel also offered in evidence notice of appeal from the order of the general term granting a new trial in same case.

Marked Exhibit No. 2.

It is admitted that the action in which this judgment was rendered was commenced *was* on November 21st, 1891.

Defendant's counsel offered in evidence deed made by Albert J. Adams and wife to Isabella Mead, March 28th, 1895, and recorded May 3d, 1895, conveying the property covered by the bond and mortgage in suit.

Marked Exhibit No. 3.

Defendant rests.

Plaintiff's counsel read the testimony of Edward J. Meegan, as follows:

EDWARD J. MEEGAN, called as a witness for the plaintiff, being duly sworn, testifies:

I reside in the city of Albany and am an attorney-*of*-law. I knew James O'Brien; remember the occasion of his release on the bail bond; I was his counsel at that time. I don't remember the date, but I remember the fact; in the morning of that day I saw Mr. Nelson; I saw him twice; in the morning he came into my office with some others—Mr. Dishler and Mr. Minchen; and we went into my back room—my private office.

Q. I want to get down—was there anything said with regard to getting bail for O'Brien?

A. That was the subject of discussion. I said it was necessary that the gentleman I was to get to sign the bond should be indemnified in such a way that it should guarantee the presence of Mr. O'Brien, and in case of default that the bond should mature.

Q. To him?

A. To Mr. Nelson and others present. Mr. Nelson then declined to sign the paper. I said, Very well, Mr. O'Brien must stay in jail; then they left and remained away for an hour or so and came back, and Mr. Nelson then said it was all right—to go ahead. I went ahead and got the man released on his bond, but subsequently, after his release, I drew the paper in question.

By the COURT:

Q. Who gave you a description of the property?

A. He did—Mr. Nelson.

Q. From what did he give it?

A. From his memory and from some paper that he had there, and I drew the paper, and he came into my outer office where I worked.

Mr. Getty, Mr. Nelson and myself were there. I then read the paper over to them, and, of course, I explained the purport of it, which was in case Thomas O'Brien didn't appear and *and* answer that the bond and mortgage would be forfeited. He said, All right,

he will appear, and he signed the paper and acknowledged it before Mr. Getty.

Q. Was anything said at that interview at any time that the signing of this bond and mortgage by Mr. Nelson was a mere matter of form?

A. No, sir; at no time. I had known Maloney for twenty years; been a client of mine.

46 Q. Before he acknowledged this bond, or at any time, was any agreement had for his signing the bond; was there an agreement that he should receive money?

A. No, sir.

Mr. Dishler handed me money. I was to get $1,000 and expenses of examination of title in case I should get the bond. I had been retained, aside from that, and fully paid up to that time. After Maloney went on the bond, and the man was discharged, I gave him $1,000 after the bond and mortgage was signed—after the whole thing was closed up.

Q. Was Nelson present when you gave him the $1,000?

A. No; except perhaps Mr. Getty and myself. Mr. Getty was present at the time that I explained to Mr. Nelson what this bond was. And when I read it over all the others were in the back room.

Defendant's counsel read the cross-examination.

Cross-examination by Mr. SMITH:

Q. You said you were to get $1,000 for examining the title?

A. No, sir; I said there was to be $1,000 paid to me if I should get a bondsman and $100 for somebody to examine the title and property and see that it was all right and put the papers on record.

Q. Whom did you get to make the examination?

A. Mr. Getty;

Q. You paid $100?

A. I did; every cent of it.

Q. You paid $1,000 to Mr. Maloney?

A. I presented him with a thousand dollars. I didn't sign the bond.

Q. That was—you say you presented him with it, what do you mean?

A. Because I was under no obligation to give it to him.

47 Q. It was a free gift of $1,000?

A. It was a free gift of $1,000 from me to Mr. Maloney.

Q. Do you remember anything about $2,000 afterwards?

A. No, sir; I do not.

Q. Did you demand of Mr. Nelson the sum of $2,000 for any purpose in your office in the presence of Mr. McCormick?

A. I did not, sir.

Q. Did you get, before you got the $1,000, $1,500?

A. Never. I received, as counsel fee in the case, $1,000.

Q. Whom did you get that from?

A. Part of it from Mr. Holland and part from a man they called Dom. Minshen.

Q. You knew Getty?

A. I did.

Q. Is he a client of yours?

A. No; he is a lawyer himself—a practicing lawyer; he is located at West Troy.

Q. He is in court?

A. He is in court, and sits by Mr. Rose.

Plaintiff's counsel read as follows:

I understand you to say that Mr. Nelson has testified that some days after—two weeks—he had an interview with you in which there was a demand made for $2,000, and if you didn't give it to him it would be worse for him?

A. That is untrue.

Q. Was there any such demand made?

A. I never had made a demand for money; I had been applied to by Mr. Holland to make application to have the bond released, and he proposed that $2,500 be put up for that purpose; I never demanded a cent—never expected a cent.

Defendant's counsel read as follows:

Q. Did you draw on Mr. Nelson for $400?

48 A. I did.

Q. When did you do that?

A. About the time that the bond was forfeited.

Q. You didn't get it?

A. I did not.

Q. You never knew Nelson until he came up there to go on the bond?

A. No, sir.

Q. You didn't offer him any consideration for going on it?

A. I didn't; I didn't know him.

Plaintiff's counsel read the examination of ROBERT I. GETTY, as follows:

I reside in West Troy. I was present at the time that Samuel Nelson signed the bond and mortgage, the subject of this suit. I signed as a subscribing witness and took acknowledgment as a notary public; at that time the bond and mortgage was read over to him by Mr. Meegan in my presence.

Q. What was said by him in respect to this being an indemnity bond or otherwise?

A. Mr. Meegan said to Nelson that the bond was for the appearance of O'Brien on that day at the opening of the court; if he was not, that the bond would be forfeited; this was before Nelson signed it, and that he must pay the $10,000 if he didn't appear.

Q. Was there anything said on that occasion that the giving of this bond, signing of that bond, was a mere matter of form?

A. Nothing of the kind.

Q. Or at any time?
A. No, sir.

Defendant's counsel read cross-examination as follows:

I am practicing law. Have been practicing law two or three years. I haven't been admitted.

Q. But you are practicing law?

49 A. Yes, sir; I have lived in New York; have been in prison in Ludlow Street jail about three months.

Plaintiff's counsel read testimony of witness as follows:

Q. What was that for?
A. I was sued by the circus company—the Howe & Cushing circus. They chartered a steamboat of me, and I entered into an agreement; they failed. They held that I refused to give them—deliver—a steamboat to them; in consequence of their failure, they got an order of arrest. An order of arrest was issued against me, a bond was fixed for $10,000, and that was the cause of my getting into Ludlow Street jail, through the inadvertence of my attorney, who was taken ill at that time that I was compelled to stay there.

Plaintiff's counsel read in evidence paragraph five of defendant Nelson's answer in the first action, which appears among the plaintiff's exhibits.

Plaintiff's counsel put in evidence register's search. Marked Exhibit I, which appears in the judgment-roll.

Defendant's counsel read in evidence affidavit of defendant Nelson, on motion to amend answer in first action, which appears with defendant's exhibits.

Testimony closed.

Defendant's counsel moved to dismiss the complaint on the ground that the record shows this action is brought for the same subject-matter that the former action was brought for; and that it appears in the judgment-roll and remittitur that this action

50 is barred by the decision and ruling and judgment of the court of appeals.

Decision reserved.

N. Y. Supreme Court, Special Term, April, 1896,

DENNIS MALONEY, Plaintiff,
vs.
SAMUEL NELSON ET AL., Defendants. } Opinion. Beekman, *J.*

Plaintiff at the solicitation of defendant N. united with said defendant as cosurety in executing the bail bond of a third person who had been indicted for a felony. In order to indemnify plaintiff for the liability so assumed, said defendant executed and delivered to plaintiff a bond and mortgage on real estate. The person for whom the bail was given failed to appear for trial, and the recognizance was declared forfeited, and directed to be prosecuted. An action

was thereupon commenced against the plaintiff and the said defendant upon the recognizance, terminating in a judgment which has been collected in full out of the property of the plaintiff. After the commencement of said action on the recognizance, but before the entry of judgment thereon, an action was brought by plaintiff against said defendant for foreclosure of said mortgage and a personal judgment for any deficiency on the bond. *Held*, that a reversal of a judgment of foreclosure and sale in the last-
51 named action upon the ground that no cause of action accrued in plaintiff's favor until he had actually paid the amount for which he had become liable under the recognizance, followed by an affirmance of the order of reversal and for a new trial by the court of appeals, plaintiff having given the usual stipulation for judgment absolute, constituted no bar to a subsequent action to foreclose the mortgage brought after the actual collection of the judgment upon the recognizance out of property of plaintiff.

A bond and mortgage given as aforesaid by one surety to indemnify his cosurety on a bail bond, are not void on grounds of public policy, or without valid consideration.

L. Laflin Kellogg and Arthur H. Smith for plaintiff.
James M. Smith for defendants.

BEEKMAN, *J.*:

The plaintiff and the defendant Nelson on the 16th day of October, 1891, entered into a recognizance in the sum of $10,000 for the appearance of one Thomas O'Brien, who had been indicted in Albany county for the crime of grand larceny in the first degree. The plaintiff was unwilling to become bail without security, and for the purpose of overcoming this objection, the defendant Nelson, who was a friend of the prisoner, promised to indemnify the plaintiff, who thereupon united with the defendant in signing the bail bond, and the prisoner was accordingly discharged. Within three hours thereafter the defendant Nelson executed and delivered to the plaintiff a bond and mortgage in the sum of $10,000, upon certain property situated in the city of New York, in pursuance of the agreement which he had made. The condition of the bond and mortgage was as follows: "That, whereas the said Maloney has signed as one surety a bond or recognizance in the penal sum of
$10,000 that Thomas O'Brien shall appear to answer the
52 charge against him in whatever court it may be prosecuted, and shall at all times render himself amenable to the orders and process of the court, and if convicted shall appear for judgment and render himself in execution thereof, and which bond or recognizance was entered into this day before Hon. Jacob H. Clute, Albany county judge; now, therefore, if there shall be no default in the said bond or recognizance so signed by said Maloney, then this obligation to be void, otherwise to remain in full force and virtue."

On the 2d day of November, 1891, O'Brien failed to appear for trial, and the recognizance was declared to be forfeited and directed

to be prosecuted according to law. An action was thereupon commenced by the district attorney for Albany county against the plaintiff and the defendant Nelson upon the recognizance, which terminated in a judgment against them on the 8th day of December, 1891, for the sum of $10,000 damages and $27.13 costs and disbursements. The summons in said action was personally served upon the defendants on the 16th day of November, 1891, and on the 21st day of November, 1891, an action was brought by the plaintiff against the defendant for the foreclosure of said mortgage, and a personal judgment for any deficiency upon the accompanying bond. The breach alleged was that O'Brien had failed to appear and answer the charge for which he had been indicted.

The defendant Nelson answered, setting up the following defenses: First. That the plaintiff had not paid any part of the sum secured by said recognizance, and that an action (the one above referred to) had been brought by the People of the State of New York against the plaintiff and the defendant, and was then pending, for the recovery of the amount of the bail bond; second, that the agreement entered into between himself and the plaintiff for the indemnification of the latter was void on the grounds of public policy,
53 and that the bond and mortgage so given was therefore without any consideration. The issues thus raised were tried on the 25th day of January, 1893, and a decision rendered in favor of the plaintiff, upon which judgment of foreclosure of sale was duly entered. The defendant thereupon appealed to the general term of this court, which reversed the judgment and ordered a new trial (Maloney *vs.* Nelson, 70 Hun., 202). The ground of the reversal was that the bond and mortgage had been given purely for the indemnification of the plaintiff, and that no cause of action accrued in his favor until he had paid the amount for which he had become liable under the recognizance. In making this disposition of the case, the general term expressly refrained from considering any other question raised by the pleadings.

From this order granting a new trial the plaintiff appealed to the court of appeals, giving the usual stipulation for judgment absolute against him should such order be affirmed. The order was affirmed (Maloney *vs.* Nelson, 144 N. Y., 182, December, 1894); judgment absolute in favor of the defendant and against the plaintiff was accordingly directed, and the judgment of the court of appeals was duly made the judgment of this court. The opinion shows that the court of appeals rested its decision on precisely the same ground as that taken by the general term.

In the meantime, and while this action was pending, executions had been issued against the plaintiff and the defendant Nelson upon the judgment which had been so recovered against them upon the recognizance, which resulted in the collection of the full amount of said judgment, to wit, $10,027.13, out of the property of the plaintiff. Thereupon this action was brought by the plaintiff for the foreclosure of the mortgage, the complaint alleging as a breach of the obligation the failure of the defendant to pay any portion of

the amount so paid by the plaintiff under the execution.
54 The defendant Nelson has answered, setting up all of the proceedings which had been taken in the first action in support of a claim that the final judgment therein was *res adjudicata* between the parties, and a bar to this action; he also defends on the ground that the bond and mortgage was without consideration and illegal, and void on grounds of public policy.

I do not think that either of these defenses is tenable as a matter of law. The judgment in the first action is not a bar to this, for the reason that the causes of action are not the same. While both are predicated upon the same instrument, the breach alleged as the ground of defendant's liability in each case is quite different. That which was set forth in the first action proceeded upon the misconception of the true nature and legal effect of the instrument, and, as was ultimately decided, was not sufficient to constitute a cause of action. The adjudication was not one which in any way touched the validity of the obligation itself. It was equivalent to a nonsuit. The court refused to determine any of the other questions raised because the plaintiff had failed at the very threshold of his case to show any breach of condition. The action, then, was in the situation of having been prematurely brought. That was all that the final judgment determined, and the plaintiff was therefore, at liberty to bring another action founded upon allegations showing that a breach of the bond, as it had been construed, had subsequently taken place (Marsh *vs.* Masterton, 101 N. Y., 401; Rose *vs.* Hawley, 141 N. Y., 366; Converse *vs.* Sickles, 146 N. Y., 200, and cases there cited and reviewed). In Rose *vs.* Hawley (*supra*) the court says: "Where a party has been defeated in his action by reason of neglect to perform some preliminary act necessary to perfect the cause of action, such as the giving of notice or the like, the judgment
55 is not a bar to another action begun after the cause of action has become perfected by the giving of notice or the performance of the requisite preliminary act, whatever it may be. A party who fails in an action upon a note or other promise for the reason that it was not due at the time the suit was commenced, may bring another action when the promise matures, and in such case the former judgment, though rendered upon the merits, is no bar, and the same principle applies to the facts in this case. A subsequent action may be brought in such case in a way to avoid the objection which proved fatal in the first."

The cause of action now set forth rests upon the ground that the plaintiff has been actually damnified through the compulsory payment of the whole amount of the recognizance, and that the occasion for the indemnification for which the bond and mortgage were given has arisen. The defendant, however, ingeniously argues that because the plaintiff in appealing to the court of appeals gave, as he was compelled by law to do, a stipulation that judgment absolute should pass against him if the order of the general term directing a new trial should be affirmed, he has assented to a final disposition of every controversy that had arisen or could thereafter arise between the parties in respect to the bond and mortgage upon which

the action was brought, and he cites, in support of his claim, decisions of the court of appeals which define the effect of judgments rendered upon such stipulations (Mackay *vs.* Lewis, 73 N. Y., 382; Hitchcock *vs.* Harris, 80 N. Y., 402).

But it is plain, upon an examination of the authorities, that the most that the court of appeals has undertaken to decide upon this point is that the defendant is entitled to whatever judgment he could have obtained upon the new trial ordered by the gen-
56 eral term. Any other construction than this would be unreasonable and quite outside of the terms of the stipulation itself. Surely it never was intended that the defendant should enjoy any greater advantage by virtue of the stipulation than he could have obtained upon a new trial. Had the plaintiff gone to a new trial, instead of appealing as he did, the only possible result would have been the dismissal of the complaint on the ground that the plaintiff had failed to allege and prove a breach of the condition of the bond, for the reasons which have been stated and expressed in the decisions of the general term and of the court of appeals. Such a judgment would not have been an adjudication upon the validity of the bond and mortgage, or in respect to any of the other questions raised by the defendant in regard to it. It would have been decisive of the cause of action upon which the plaintiff declared, and to that extent the judgment absolute entered upon the stipulation goes, and from the nature of the case it would seem that it could go no further. A different cause of action has now arisen growing out of facts which did not exist when the first action was brought and which were in no sense within the issues there raised. The case of Roberts *vs.* Baumgarten (126 N. Y., 336) is not antagonistic to this view. In that case the action was in ejectment, and judgment had been rendered in favor of the plaintiff upon the trial of an issue of fact. The judgment was reversed by the general term and a new trial ordered. The plaintiff appealed from this order, with the usual stipulation. The order was affirmed by the court of appeals and judgment absolute rendered against the plaintiff, whereupon the plaintiff, having paid the costs and damages awarded against him, obtained an order at special term vacating the judgment and granting a new trial, under sections 1524 and 1525 of the Code of Civil Procedure. The order thus made was subsequently vacated, and from that order an appeal was taken to the gen-
57 eral term which affirmed the action of the court below, and upon appeal to the court of appeals the order of the general term was also affirmed. In that case, however, the new trial was sought under express statutory provision giving it in certain cases as a matter of right. It was not a case where a new action was brought upon different facts or a new cause of action. The cause of action, the pleadings and the issues were precisely the same, and the whole point of the decision of the court of appeals rests upon a necessary waiver by the plaintiff of his right to a new trial under the statute by reason of the stipulation for judgment absolute into which he had entered when he appealed to the court of appeals. In other words, it was held that a new trial under the

statute was incompatible with the contract into which the plaintiff had entered when he made the stipulation, and that he must be deemed by his own act to have waived or renounced any such right. The case therefore rests upon an entirely different principle from the one at bar, and is not opposed to the views which I have expressed in respect to the effect of the final judgment in the former action between these parties.

While, of course, it is merely *obiter*, still it may not be amiss to refer to the fact that Judge Peckham, in giving the opinion of the court in the decision of the appeal taken in the first action between these parties, says (Moloney *vs.* Nelson, 144 N. Y., at p. 188): "Upon the whole we think that without proof that the plaintiff had paid all or some portion of the amount named in the bail bond, the action to foreclose this mortgage cannot be sustained. The amount that plaintiff may be called upon to pay, and which he does pay, may be recovered back by a future action to foreclose this mortgage."

The only other point which it is necessary for me to consider is in respect to the question now raised as to the validity of the bond and mortgage under the claim made by the defendant that it is void on grounds of public policy. The theory upon which
58 the proposition is advanced is that the object of the recognizance is to secure the attendance of the prisoner when his presence is needed by the State; that the sureties, by reason of the obligations which they have assumed, are under a strong incentive to vigilance in watching his movements and securing his presence in court when required; and that if they are indemnified, and therefore secured against loss, this incentive is removed and the State is thus deprived of an essential guaranty of performance. There is no decision in this State holding any such proposition as this; indeed, the books are quite barren of decisions on the question. The same point was raised in the case of Simpson *vs.* Roberts (35 Ga., 180), but was decided adversely to the claim. The question was also discussed at some length by Judge Benedict in the case of United States *vs.* Simmons (47 Fed. Rep., 577). There it appeared upon the examination of the sureties offered by the prisoner that he and others had agreed to indemnify them. Upon objection made by the district attorney, the sureties were rejected on this ground, the judge holding that, as the agreement was void on grounds of public policy, the sureties should not be accepted. The cases which he cites, however, upon examination are hardly sufficient upon which to rest the broad proposition that all agreements to indemnify sureties on undertakings in criminal causes are void. The case of U. S. *vs.* Rider (110 U. S., 729), which he cites, simply held that the sureties upon the bail bond, upon paying the same after forfeiture, were not subrogated to the rights of the Government as against the defendant, on the ground that the satisfaction of the bond is not a discharge of the object for which it was given, and that the obligation of the sureties, so called, is primary. Not only does this case fail as an authority for the proposition in question, but the court

cites Simpson *vs.* Roberts, *supra*, and declares that it is — en-
59 tire accord with the case of Chipps *vs.* Hartnoll (4 B. & S., 414), where it was held by the court of exchequer chamber, upon much consideration, that an express contract to indemnify the bail in a criminal case might be sustained, but that no such contract is implied by law.

In the case of Herman *vs.* Jeuchner (15 Q. B. Div., 561), the plaintiff was required to give a bond with a surety for his good behavior. In order to obtain the necessary surety, he deposited with him an amount in money equal to the penalty of the bond. This the court held to be illegal, as it was virtually subversive of the purpose for which the bond was required. In so doing it distinguished the case of Chipps *vs.* Hartnoll (*supra*), on the ground, among others, that there the promise to indemnify was not made by the person for whose appearance the surety was bound. In the case of Jones *vs.* Orchard (16 C. B., 614) the question is left entirely undecided, the court saying that while inclined to consider the point well taken, it was unnecessary to decide it.

It will thus be seen that the decisions upon this subject are quite inconclusive. As I have said, the question does not seem to have been passed upon by the courts of this State. This of itself should be an answer to the claim. The case is not one presented by novel conditions, and it may well be assumed that the probability of the indemnification or bail would have been considered and prohibited by the legislature if there had seemed to be sufficient reason for such action. It is primarily for the legislature to determine the policy of the State, and the courts are usually reluctant to enter upon this kind of judicial legislation (Hollis *vs.* Drew, Theo. Seminary, 95 N. Y., 166). In the case cited, Judge Earl says (p. 171): "It is difficult to define and limit the power thus to enforce public policy which is not found in the statute law, and it should be exercised only in clear cases, and generally within limits already de-
60 fined by decisions of acknowledged authority, based upon rules of the common law. There is certainly no occasion for stretching the power so as to apply it to new or doubtful cases in a State where the legislature is in session one-third of the year, and thus competent to indicate the public will as to any line of supposed public policy."

These remarks seem quite appropriate to the case at bar. The legislature has codified the substantive and remedial law in respect to crimes, and in so doing has regulated the subject of bail. It has not seen fit to prohibit indemnification in such cases, and as the act is not in itself immoral or essentially vicious in its operation, the courts will not undertake to supplement a legislative act by pronouncing against that which the legislature, in dealing with the general subject, has not seen fit to prohibit. Indeed, in authorizing the deposit of money by the prisoner in lieu of bail, it has greatly weakened, if not entirely destroyed, the reasoning upon which this claim of public policy has been built up.

I am therefore of the opinion that the defense of invalidity raised by the defendant on the ground above stated is untenable. The

bond and mortgage having been given upon a valid consideration, and the plaintiff having established a breach of the condition, he is entitled to a judgment. Judgment for plaintiff, with costs.

61 Supreme Court, City and County of New York.

DENNIS MOLONEY, Plaintiff,
vs.
SAMUEL NELSON and Others, Defendants. } Defendant Samuel Nelson's Exceptions to the Decision.

I. The defendant Samuel Nelson excepts to so much of the decision of Justice Henry R. Beekman, filed May 1st, 1896, as finds as follows, viz: "That the defendant Samuel Nelson, in order to induce the plaintiff to enter into said recognizance, agreed to indemnify him against liability thereunder, and the plaintiff relying upon said agreement, and not otherwise, entered into and executed the same as aforesaid, and the said defendant Samuel Nelson immediately thereafter, and in fulfillment of said agreement, did execute and deliver to the plaintiff Dennis Moloney the bond and mortgage set up in the complaint in this action, which said mortgage was thereafter and on the 17th day of October duly recorded in the office of the register of the city and county of New York."

II. Said defendant also excepts to the decision, which states as follows, viz: "I do, therefore, decide as follows: That there is due on the bond and mortgage mentioned and described in the complaint in this action the sum of $10,000, with interest from June 5th, 1893, amounting to this date to the sum of $1,766.65, and that plaintiff is entitled to the usual judgment of foreclosure and
62 sale of the premises mentioned in the complaint for the sum of $11,766.65, together with the costs and disbursements of this action, and an allowance of $200 in addition to costs. I do also decide the defendant Samuel Nelson shall be adjudged to pay any deficiency that may arise on the sale under foreclosure.

Dated May 8th, 1896.

JAMES M. SMITH,
Attorney for Defendant Samuel Nelson.

To Messrs. Kellogg, Rose & Smith, attorneys for plaintiff, and Henry D. Purroy, Esq., clerk of the city and county of New York.

63 Supreme Court.

DENNIS MALONEY, Plaintiff,
against
SAMUEL NELSON and Others, Defendants. } Notice of Appeal.

You will please take notice, that the defendant Samuel Nelson hereby appeals to the appellate division of the supreme court of the first department, from the judgment of foreclosure and sale in favor of the plaintiff and against the defendants, entered on the 2d day of

May, 1896, in the office of the clerk of the city and county of New York.

May 16th, 1896.

Yours, &c.,

JAMES M. SMITH,
Attorney for Defendant Samuel Nelson,
No. 132 *Nassau Street, New York City.*

To Messrs. Kellogg, Rose & Smith, attorneys for plaintiff; and Henry D. Purroy, Esq., clerk of the city and county of New York.

64 PLAINTIFF'S EXHIBIT A.

Know all men by these presents, that I, Samuel Nelson, of the city of New York, am held and firmly bound unto Dennis Moloney, of the village of West Troy, N. Y., in the sum of ten thousand dollars, to be paid to the said Molony or to his certain attorney, executors, administrators or assigns.

For which payment, well and truly to be made, I bind myself and my heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed this 16th day of October, in the year of our Lord one thousand eight hundred and ninety-one.

The condition of this obligation is such that whereas, the said Moloney has signed as one surety a bond or recognizance in the penal sum of ten thousand dollars that Thomas O'Brien shall appear to answer against him in whatever court it may be prosecuted, and shall, at all times, render himself amenable to the orders and process of the court, and if convicted, shall appear for judgment and render himself in execution thereof, and which bond or recognizance was entered into this day before Hon. Jacob H. Clute, Albany county judge; now, therefore, if there shall be no default in the said bond or recognizance, so signed by said Moloney, then this obligation to be void, otherwise to remain in full force and virtue.

[SEAL.] SAMUEL NELSON.

Sealed and delivered in the presence of—
ROB'T I. GETTY.

65 STATE OF NEW YORK, } *ss.:*
County of Albany, }

On this 16th day of October, in the year one thousand eight hundred and ninety-one, before me, the subscriber, personally came Samuel Nelson, to me known to be the person described in and who executed the within instrument, and he acknowledged that he executed the same.

ROBERT I. GETTY.

PLAINTIFF'S EXHIBIT B.

This indenture, made this 16th day of October, 1891, between Samuel Nelson, of the city of New York, party of the first part, and

Dennis Moloney, of the village of West Troy, N. Y., party of the second part.

Whereas, the said party of the second part has signed as one surety a bond or recognizance in the penal sum of ten thousand dollars, that Thomas O'Brien shall appear to answer the charge against him in whatever court it may be presented, and shall at all times render himself amenable to the orders and process of the court, and, if convicted, shall appear for judgment, and render himself in execution thereof, and which bond or recognizance was entered into this day before Hon. Jacob H. Clute, Albany county judge; and the said party of the first part is desirous of indemnifying and saving harmless the said party of the second part from any or all loss or damage upon said bond or recognizance.

Now, therefore, this indenture witnesseth that the said party of the first part, in consideration of the sum of one dollar to him in hand paid by the party of the second part, and for the better securing of the said party of the second part, does grant and re-
66 lease unto the said party of the second part and to his heirs and assigns forever.

All that lot of land in the city of New York, bounded as follows: Beginning at the corner formed by the intersection of the southerly side of 131st street with the westerly side of Tenth avenue; running thence southerly, along the westerly side of said Tenth avenue, 24 feet 11 inches; thence westerly, parallel with 131st street, 100 feet; thence northerly, parallel with Tenth avenue, 24 feet 11 inches to the southerly side of 131st street, and thence easterly, along the southerly side of 131st street, 100 feet, to the point of beginning, be the same more or less.

Also all that certain other lot of land in the city of New York, situated on West 52d street, and known and designated as street number 416, being on the south side of 52d street, and between Ninth and Tenth avenues.

Together with the appurtenances and all the estate and rights of the party of the first part in and to the said premises. To have and to hold the above-granted premises unto the said party of the second part, his heirs and assigns forever.

Provided, always, that whereas the said party of the second part has signed as one surety a bond or recognizance in the penal sum of ten thousand dollars, that Thomas O'Brien shall appear to answer the charge against him in whatever court it may be prosecuted, and shall at all times render himself amenable to the orders and process of the court, and, if convicted, shall appear for judgment and render himself in execution thereof, and which bond or recognizance was entered into this day before Hon. Jacob H. Clute, Albany County judge. Now, therefore, if there shall be no default in the said bond or recognizance so signed by the party of the second part, and as is provided by a bond of even date herewith signed by the party of the first part, then these presents and the estate hereby created shall cease, determine and be void.

67 And the said party of the first part covenants with the party of the second part as follows:

That if default be made in the above-named conditions, or any of them, the party of the second part shall have power to sell the premises therein described according to law.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

SAMUEL NELSON. [L. S.]

In presence of—
ROBERT I. GETTY.

STATE OF NEW YORK, } ss:
City and County of Albany, }

On the 16th day of October, 1891, before me, the subscriber, personally came Samuel Nelson, to me known to be the person described in and who executed the within instrument, and he acknowledged that he executed the same.

ROBERT I. GETTY,
Notary Public, Albany Co., N. Y.

STATE OF NEW YORK, } ss:
City and County of New York, }

On the 17th day of October, 1891, before me personally came Robert I. Getty, subscribing witness to the foregoing instrument, with whom I am personally acquainted, who, being by me duly sworn, said that he resided in the village of West Troy, State of New York; that he knows Samuel Nelson, the individual who executed the foregoing instrument; that he saw him sign, deliver and execute the same, and acknowledged to him, said Robert I.
68 Getty, that he signed, sealed and delivered the same for the purposes therein mentioned, and that he, said Robert I. Getty, thereupon subscribed his name as a witness thereto.

ARTHUR H. SMITH,
Notary Public, Kings Co.

Certificate filed in N. Y. county, Lib. 8, p. 17, block system.
Signature, ROB'T I. GETTY.

STATE OF NEW YORK, } ss:
County of Albany, }

I, Ansel C. Requa, clerk of the supreme court and county courts, and of the county and State aforesaid, do hereby certify that Robert I. Getty is a notary public in and for the said county, duly qualified to act as such. That his term of office commenced on the 7th day of April in the year 1891, and will expire on the 30th day of March, in the year 1893, and that his signature above written is genuine.

Given under my hand and seal, at the Albany county clerk's office, this 16th day of Oct., 1891.

[SEAL.] A. C. REQUA, *Clerk.*

The land affected by the within instrument lies in section 4 in block 1061, and in section 7 in block 1985 on the land map of the city of New York.

Recorded in the office of the register of the city and county of New York on the 17th day of October, A. D. 1891, at 10 o'clock 17 min. a. m. in block series (mortgages), section 4, Lib. 8, page 393, and indexed under block number 1061 on the land map of the city of New York.

Witness my hand and official seal.

[SEAL.] FRANK T. FITZGERALD, *Register.*

69 Recorded in the office of the register of the city and county of New York on the 17th day of October, A. D. 1891, at 10 o'clock 17 min. a. m., in block series (mortgages), section 7, Lib. 8, page 17, and indexed under block number 1985 on the land map of the city of New York.

Witness my hand and official seal.

[SEAL.] FRANK T. FITZGERALD, *Register.*

PLAINTIFF'S EXHIBIT C.

COUNTY OF ALBANY:

In the name of the People of the State of New York to any peace officer in this State:

An indictment having been found at the *the* February term, eighteen hundred and eighty-nine, in the court of sessions of the county of Albany, charging Thomas O'Brien with the crime of grand larceny in the first degree, you are therefore commanded, forthwith, to arrest the above-named Thomas O'Brien, and bring him before that court to answer the indictment, or if the court have adjourned for the term, that you deliver him into the custody of the sheriff of the county of Albany or the jailer of the county of Albany.

City of Albany, the 25th day of September, 1891.

By order of the court:

ANDREW HAMILTON,
District Attorney of the County of Albany.

Endorsed.

"I have discharged the within-named defendant, Thomas O'Brien, on bail in the sum of $10,000.00.

"Dated the 16th day of October, 1891.

"J. H. CLUTE,
"*County Judge of Albany County.*

"Dis. October 16th, —, 3 p. m."

70 PLAINTIFF'S EXHIBIT D.

STATE OF NEW YORK, } ss:
City and County of Albany, }

An indictment having been found at the February term of the court of sessions, 1891, of the county of Albany, charging Thomas O'Brien (named by other names also therein, and jointly indicted

with George Post) with the crime of grand larceny in the first degree, and he having been duly admitted to bail in the sum of ten thousand dollars,

We, Thomas O'Brien (defendant) and Samuel Nelson, of the city and county of New York, and Dennis Moloney, of West Troy, Albany county, N. Y., hereby undertake that the above-named Thomas O'Brien shall appear and answer the charge above mentioned in whatever court it may be prosecuted, and shall at all times render himself amenable to the orders and process of the court; and, if convicted, shall appear for judgment, and render himself in execution thereof; or, if he fail to perform either of these conditions, that we will pay to the People of the State of New York the sum of ten thousand dollars.

THOMAS E. O'BRIEN.
SAMUEL NELSON.
DENNIS MOLONEY.

Taken, subscribed and acknowledged before me this 16th day of October, 1891.

J. H. CLUTE,
County Judge, Albany County.

71 STATE OF NEW YORK, } ss:
City and County of Albany, }

Samuel Nelson, of New York county, being duly sworn, doth depose and say: That he is a resident of, and a freeholder within, this State, to wit, in said county of New York, and that he is worth thirty thousand dollars over and above all debts, dues and demands and liabilities whatsoever, and exclusive of property exempt from levy and sale on execution, and that his property consists of real estate in the city of New York, more fully described and set forth in the examination of the deponent taken in these proceedings hereto annexed.

SAMUEL NELSON.

Subscribed and sworn to before me this 16th day of October, 1891.

J. H. CLUTE,
County Judge of Albany County.

STATE OF NEW YORK, } ss:
City and County of Albany, }

Dennis Moloney, of said county, being duly sworn, doth depose and say: That he is a resident of, and freeholder within, this State, to wit, in said county, and that he is worth fifteen thousand dollars over and above all dues, debts and demands and liabilities whatsoever, and exclusive of property exempt from levy and sale on execution, and that his property consists of real estate situated in the village of West Troy, and a farm in Saratoga county, and which real estate is more fully described in the examination of the deponent in these proceedings hereto annexed.

DENNIS MOLONEY.

Subscribed and sworn to before me the 16th day of October, 1891.
J. H. CLUTE,
County Judge of Albany County.

72 ALBANY, *October* 16, 1891.

THE PEOPLE, &c.,
against
THOMAS O'BRIEN.

I hereby order that the above-named defendant be held to bail upon the indictment in the court of sessions, Albany county, against him for grand larceny in the first degree, in the sum of ten thousand dollars, and I allow the bail offered in the person of Dennis Moloney and Samuel Nelson with and for the defendant.
J. H. CLUTE,
County Judge of Albany County.

EXHIBIT.

Paragraph V, Nelson's Answer in First Action of Moloney vs. Nelson.

V. For a further and separate answer to said complaint this defendant says that, previous to the execution of the bond and mortgage hereinbefore referred to, he was solicited by said O'Brien to become bondsman, and to procure another person to become bondsman, for said O'Brien, who was then in the Albany county prison. That this defendant applied, on behalf of said O'Brien, to the said plaintiff, and requested said plaintiff to become bondsman for said O'Brien. That said plaintiff agreed to become such bondsman upon condition that he should receive one thousand ($1,000) dollars in cash for so doing, and security for whatever amount
73 he should pay if said O'Brien failed to appear and abide the orders of the court, as hereinbefore stated. That this defendant paid to said plaintiff said sum of one thousand dollars, and at his request, after said O'Brien had been released from prison, he executed said bond and mortgage for $10,000.

PLAINTIFF'S EXHIBIT E.

At a court of sessions held in and for the county of Albany at the city hall in the city of Albany on Monday, Nov. 2d, 1891.
Present: Hon Jacob H. Clute, county judge.
Hon. David S. Reinhart,
Hon. Perry Stewart, justices of sessions.

THE PEOPLE
vs.
THOMAS O'BRIEN.

Thomas O'Brien, the defendant, being called by the district attorney for trial and neglecting to appear for trial after proclamation made calling on said defendant to appear and also upon his said

sureties Samuel Nelson and Dennis Maloney to produce said Thomas O'Brien, and the said Thomas O'Brien neglecting to appear for trial the court directed these facts to be entered on the minutes and undertaking of his bail declared forfeited, and the same directed to be prosecuted according to law, and that a bench warrant issue for the arrest of said defendant Thomas O'Brien.

A true copy of the record.

[SEAL.] J. M. BORTHNICK, *Clerk.*

74 EXHIBIT F

Is a judgment-roll in action brought by The People against Dennis Maloney and Samuel Nelson in an action to recover on the forfeited recognizance, Exhibit D.

Judgment entered in Albany county clerk's office Dec. 8th, 1891, in favor of The People against Maloney & Nelson for $10,027.13.

EXHIBIT G

Is an execution issued on judgment, Exhibit F, dated April 29, 1892. Returned June 5th, 1893, marked satisfied for $9,536.05.

EXHIBIT H

Is an execution issued on judgment, Exhibit F, dated April 14th, 1893; returned June 5th, 1893; marked satisfied in full for $1,263.14.

DEFENDANTS' EXHIBIT 1.

This exhibit is the remittitur from the court of appeals in the case of Moloney *vs.* Nelson, reported — 144 N. Y., 182, only a portion of the same being considered necessary to print for the purpose of reviewing the decision in the present case.

In addition to the printing of the following papers, is is conceded that the plaintiff, neither at time of the commencement of that action nor at the time of trial, had paid any portion of the recognizance nor the judgment obtained against the plaintiff thereon.

75 *Pleadings in the Former Action.*

Supreme Court of the State of New York, City and County of New York.

DENNIS MOLONEY, Plaintiff, *against* SAMUEL NELSON, ALBERT J. ADAMS, and Mary Adams, His Wife, the Name Mary Being Fictitious, the True Name of said Mary Adams Being Unknown to the Plaintiff, Defendants.	Complaint for the Foreclosure of a Mortgage.

The plaintiff, by this his complaint, respectfully states to this court, upon information and belief:

That the above-named defendant, Samuel Nelson, for the purpose

of securing the payment to the above-named plaintiff of the sum of ten thousand dollars on or about the 16th day of October, one thousand eight hundred and ninety-one, executed and delivered to the above-named plaintiff a bond bearing date on that day, sealed with his seal, whereby the said defendant, Samuel Nelson, bound himself, his heirs, executors and administrators, in the penalty of ten thousand dollars, upon condition that the same should be void if one Thomas O'Brien, for whose appearance to answer a certain charge of grand larceny this plaintiff and the defendant Nelson became bond as sureties, should appear to answer a charge of grand larceny made against said O'Brien in whatever court he should be prosecuted for said crime, and should at all times render himself amenable to the orders and process of the court in which he
76 should be called upon to appear and answer, and if convicted should appear for judgment and render himself in execution thereof, pursuant to a certain bail bond given to the People of the State of New York at the city of Albany on the 16th day of October, 1891, and as collateral security for the payment of the said obligation the said Samuel Nelson on the same day executed, duly acknowledged and delivered to the said Dennis Moloney, the plaintiff in this action, a mortgage, whereby he granted, bargained, and sold to the said Dennis Moloney, the plaintiff in this action, the following-described premises, with the appurtenances thereto; that is to say, all that lot of land in the city of New York, bounded as follows: Beginning at the corner formed by the intersection of the southerly side of 131st street with the westerly side of Tenth avenue; running thence southerly, along the westerly side of said Tenth avenue, twenty-four feet eleven inches; thence westerly, parallel with 131st street, one hundred feet; thence northerly, parallel with Tenth avenue, twenty-four feet eleven inches to the southerly side of 131st street; and thence easterly, along the southerly side of 131st street, one hundred feet to the point of beginning, be the same more or less.

Also all that certain other lot of land in the city of New York, situated on West Fifty-second street, and known and designated as street number 416, being on the south side of Fifty-second street and between Ninth and Tenth avenues, which said last-mentioned lot is described as follows:

Beginning at a point on the southerly side of West Fifty-second street, distant two hundred feet westerly from the westerly side of Ninth avenue; running thence southerly, parallel to Ninth avenue, one hundred feet five inches; running thence westerly, parallel to Fifty-second street, twenty-five feet; running thence northerly, again parallel to Ninth avenue, one hundred feet five inches
77 to the said southerly side of Fifty-second street; running thence easterly and along said southerly side of Fifty-second street twenty-five feet to the point or place of beginning, with a proviso in substance the same as the condition of the said bond and with power and authority to the plaintiff, in case of default in the conditions named in said bond or any of them, to sell the said mortgaged premises in due form of law, and out of the moneys

arising from the sale thereof to pay the said sum of money, with the costs and expenses of the proceedings, thereupon rendering the overplus, if any, to the said Samuel Nelson.

And the plaintiff further states that the said mortgage was duly recorded in the office of the register of the county of New York on the 17th day of October, one thousand eight hundred and ninety-one, in Liber 8 of Mortgages, page 17, &c., in New York city block system of recording.

And the said plaintiff further states that the said defendant has failed to comply with the condition of the said bond and mortgage as follows:

That before the making and execution of said bond and mortgage the said Thomas O'Brien had, as principal, entered into a recognizance to appear and answer a charge and indictment of grand larceny in whatever court it might be prosecuted, and should, at all times, render himself amenable to the orders and process of the court.

That thereafter, and at a term of the court of sessions, held in and for the said county of Albany, on the 2d day of November, 1891, which said court of sessions had jurisdiction of said charge and indictment against said Thomas O'Brien, and was a court where, under said recognizance, said Thomas O'Brien was to appear and answer, the said Thomas O'Brien failed to appear and answer the said charge and indictment, when required, and failed to obey the orders and process of such court, and failed to hold himself
78 amenable to the orders and process of such court, whereby there was a breach of the condition of the said bond given by said Nelson to this plaintiff, and there is now justly due to the plaintiff upon the said bond and mortgage the sum of ten thousand dollars.

And the plaintiff further states that no other action or proceeding has been had at law or otherwise, to his knowledge or belief, for the recovery of the said sum secured by the said bond or mortgage, or any part thereof.

And the plaintiff further says that he is informed and believes, and therefore states, that the defendants, Albert J. Adams and Mary Adams, have, or claim to have, some interest in, or lien upon, the said mortgaged premises, or some part thereof, which interest or lien, if any, has accrued subsequently to the lien of the said mortgage.

The plaintiff, therefore, demands that the defendant Samuel Nelson, and all persons claiming under him, subsequent to the filing of a notice of the pendency of this action in the office of the clerk of the county in which the said mortgaged premises are situated, may be barred and foreclosed of all right, claim, lien and equity of redemption in the said mortgaged premises; that the said premises may be decreed to be sold according to law; that the moneys arising from the sale may be brought into court; that the plaintiff may be paid the amount due on the said bond and mortgage, with interest, to the amount of such moneys properly applicable thereto will pay the same; that the defendant Samuel Nelson, may be ad-

judged to pay any deficiency which may remain, after applying all of said moneys so applicable thereto; and that the plaintiff may have such other or further relief, or both, in the premises, as shall be just and equitable.

KELLOGG, ROSE & SMITH,
Plaintiff's Attorneys, 120 *Broadway, New York City.*

Verified November 18th, 1891.

79 Supreme Court.

DENNIS MALONEY, Plaintiff,
against
SAMUEL NELSON, ALBERT J. ADAMS, and MARY ADAMS, Defendants.

CITY AND COUNTY OF NEW YORK:

The Answer of Samuel Nelson, One of the Defendants in the Above-entitled Action.

I. This defendant admits that on or about the 16th day of October, 1891, he executed and delivered to the plaintiff a bond (a copy of which is hereto annexed marked Schedule A, and to which defendant refers as part of his answer) for $10,000 and a mortgage upon certain property in the city of New York, which property defendant believes is correctly described in said complaint.

II. This defendant on information and belief admits that said mortgage was recorded as stated and set forth in the complaint.

III. This defendant admits that said Thomas O'Brien as principal entered into a recognizance to appear and answer a charge of grand larceny at the time and place stated in the complaint.

IV. This defendant denies that there is now justly due to the plaintiff the sum of ten thousand ($10,000) dollars or any sum upon said bond and mortgage given by him to the plaintiff for the reasons hereinafter set forth.

80 V. For a further and separate answer to said complaint this defendant says that, previous to the execution of the bond and mortgage hereinbefore referred to, he was solicited by said O'Brien to become bondsman, and to procure another person to become bondsman, for said O'Brien, who was then in the Albany County prison. That this defendant applied, on behalf of said O'Brien, to the said plaintiff, and requested said plaintiff to become bondsman for said O'Brien. That said plaintiff agreed to become such bondsman upon condition that — should receive one thousand ($1,000) dollars in cash for so doing, and security for whatever amount he should pay if said O'Brien failed to appear and abide the orders of the court, as hereinbefore stated. That this defendant paid to said plaintiff said sum of one thousand dollars, and at his request, after said O'Brien had been released from prison, he executed said bond and mortgage for $10,000.

VI. This defendant further says on information and belief that

said plaintiff has paid no part of the sum secured by said recognizance, and that on or about the 16th day of November, 1891, an action was commenced in the supreme court to recover the amount of said recognizance. That such action is brought by The People of the State of New York, plaintiff, against Thomas O'Brien, Samuel Nelson, the defendant and Dennis Moloney, the plaintiff in this action.

VII. This defendant insists and claims that said bond and mortgage, if a valid obligation, is held by plaintiff to secure any amount he shall actually pay to cancel his said plaintiff's obligation on said recognizance, and no other purpose.

VIII. And this defendant further says, that through inadvertence or mistake the said bond and mortgage does not correctly express the contract or agreement made between plaintiff and this
81 defendant, and this defendant insists that the same should be reformed by inserting after the word (Moloney) where the word last appears in said bond, hereto annexed, marked Schedule A, the following: "And the said Moloney shall not pay said $10,000, or any part thereof, by reason of any default on the part of said O'Brien to appear in pursuance of the requirements of said bail bond."

IX. The defendant further says he received no consideration for said bond and mortgage. That since the same was executed by him he has been advised, and believes, that contracts indemnifying bail in criminal cases are illegal, and against public policy.

X. And this defendant says, on information and belief, that the said O'Brien has been arrested, and is now in custody, and ready to be surrendered to the authorities of the county of Albany to answer the charge aforesaid.

Wherefore, defendant demands judgment that said complaint be dismissed, with costs.

JAMES M. SMITH,
Attorney for Defendant Nelson.

82 SCHEDULE A.

Know all men by these presents, that I, Samuel Nelson, of the city of New York, am held and firmly bound unto Dennis Moloney, of the village of West Troy, N. Y., in the sum of ten thousand (10,000) dollars, to be paid to said Moloney, or to his certain attorney, executor, administrator or assigns, for which payment well and truly to be made, I bind myself and my heirs, executors and administrators, jointly and severally, firmly by these presents, dated this 15th day of October, in the year of our Lord one thousand eight hundred and ninety-one.

The condition of this obligation is such that whereas the said Moloney has signed as one surety a bond or recognizance in the penal sum of ten thousand dollars that Thomas O'Brien shall appear to answer the charge against him in whatever court it may be prosecuted, — shall at all times render himself amenable to the orders and process of the court, and if convicted, shall appear for judgment,

and render himself in execution thereof; and which bond and recognizance was entered into this day before Hon. Jacob H. Clute, Albany county judge. Now, therefore, if there shall be no default in said bond or recognizance, so signed by said Moloney, then this obligation to be void; otherwise to remain in full force and virtue.

SAMUEL NELSON.

Sealed and delivered in presence of—
ROBERT I. GETTY.

And acknowledged.

Answer verified.

83 *Opinion of General Term.*

Supreme Court, First Department.

MAY, 1893.

Chas. H. Van Brunt, P. J.; David L. Follett, Geo. C. Barrett, JJ

DENNIS MALONEY, Respondent,
against
SAMUEL NELSON ET AL., Appellant-. } No. 52.

Appeal from judgment of foreclosure and sale.

Mr. J. M. Smith, of counsel for appellant-.
Mr. A. J. Rose, of counsel for respondent.

VAN BRUNT, *P. J.:*

It appears that prior to the 16th of October, 1891, one Thomas O'Brien had been indicted by the grand jury of Albany county, and on his arrest had been held to bail to answer such indictment in the sum of $10,000. Various efforts were made to procure bail for said O'Brien, in which benevolent enterprise the defendant seems to have interested himself. And on the 16th October, 1891, he went to Albany, and thence to the office of the counsel of O'Brien, and was there told that such counsel would get some one to go on the bond with him, and that it was necessary that the gentleman he was to get to sign the bond should be indemnified in such a way as to guarantee the presence of O'Brien, and in case of default the bond should mature. The defendant at first refused to give such
84 guarantee, but later in the day he appeared and said it was all right, and for the counsel to go ahead. Subsequently the plaintiff and the defendant became bail for O'Brien and he was discharged. After such discharge the parties went to the office of O'Brien's counsel, and there the bond and mortgage in suit was drawn up by the defendant Nelson and delivered to the plaintiff.

The condition of this bond was that, "Whereas, the said Maloney has signed as one surety a bond or recognizance in the penal sum of ten thousand dollars that Thomas O'Brien shall appear to answer against him in whatever court it may be prosecuted, and shall at

all times render himself amenable to the orders and process of the court, and if convicted, shall appear for judgment and render himself in execution thereof, and which bond or recognizance was entered into this day before Hon. Jacob H. Clute, Albany county judge; now, therefore, if there shall be no default in the said bond or recognizance so signed by said Moloney, then this obligation to be void, otherwise to remain in full force and virtue."

When the case of The People *v.* O'Brien was called at the court for trial O'Brien did not appear, and the bail bond given for his appearance on which Nelson and Maloney, the parties to this action, were sureties, was forfeited, and this action was commenced.

After the commencement of the action a suit was brought on the bail bond and judgment recovered against Nelson and Maloney, which judgment is yet unpaid, the execution thereon having been returned unsatisfied as to the defendant Nelson, and property of Maloney being under levy and advertisement for sale.

Upon these facts the court directed judgment in favor of the plaintiff, and from the judgment entered thereon this appeal is taken.

Various grounds are urged in support of this appeal—that
85 the contract was one to indemnify the plaintiff and against public policy; that there was no consideration for the obligation, and also that it was error to refuse certain requests.

It seems to us that it is not necessary to consider the question as to whether a contract of indemnity is against public policy in a criminal action or not. It is perfectly apparent that the giving of this bond and mortgage was intended to indemnify Maloney for whatever he should be required to pay by reason of his having become bail for O'Brien. If such was not the contract, then the bond is utterly without consideration, because it is conceded that the plaintiff paid nothing to the time of the execution of the bond. On the contrary, the only person who got any money appears to have been the plaintiff, who got $1,000 for becoming the bail of O'Brien.

The plaintiff, therefore, certainly has no right to recover, as he has paid nothing upon his bail bond—has suffered no damage as yet, and there is nothing in respect to which he is to be indemnified. If, as already stated, this bond and mortgage was not given as an indemnity, then it was absolutely without consideration.

The result of the decree of foreclosure in this action as against Nelson, show- at a glance that the plaintiff, in the present condition of affairs, can have no right to recover. Suppose that Maloney receives $10,000 upon the foreclosure of this property, and never pays any part of the bail bond—is never required to pay any part of the bail bond, and Nelson is required to pay the whole of it—the result would be that Nelson would be paying $20,000 upon an obligation of $10,000, and Maloney would be $10,000 in pocket.

The mere statement of this proposition shows that the claim advanced upon the part of the plaintiff cannot be maintained.

It is perfectly clear that at the time of the commencement of this action Maloney had no claim whatever. His contract of indemnity

had not then been violated, and if there was no contract of
86 indemnity, he had no claim; even if he had, such claim of contract of indemnity existed and had been violated.

It seems to be clear, therefore, that the judgment was erroneous, and must be reversed, with costs to appellant to abide event.

Concur.

D. L. F.

Concur.

G. C. B.

DEFENDANTS' EXHIBIT No. 2.

Supreme Court of the State of New York, City and County of New York.

DENNIS MOLONEY, Plaintiff and Appellant,
against
SAMUEL NELSON, Def't and Resp'd't, and Others.

SIRS: Please take notice that the above-named plaintiff hereby appeals to the court of appeals of the State of New York from the order of the general term of this court, dated June 30th, 1893, and entered in the office of the clerk of the county of New York, which order reversed a judgment of foreclosure and sale in favor of this plaintiff and against the defendants, and ordered a new trial of this action, and does hereby appeal from each and every part of said order; and the above-named plaintiff and appellant hereby stipulates and agrees that if such order of the general term hereby
87 appealed from be affirmed, judgment absolute shall be rendered against this plaintiff in favor of the above-named defendant and respondent.

Dated New York, August 25th, 1893.

Yours, etc., KELLOGG, ROSE & SMITH,
Attorneys for Plaintiff and Appellant,
120 *Broadway, N. Y. City.*

To James M. Smith, Esq., attorney for defendant and respondent, and Henry D. Purroy, Esq., county clerk, New York county.

DEFENDANTS' EXHIBIT No. 1.

DENNIS MOLONEY, Appellant,
against
SAMUEL NELSON and Others, Respondents.

Be it remembered, that on the 12th day of September, in the year of our Lord one thousand eight hundred and ninety-three, Dennis Moloney, the appellant in this action, came here into the court of appeals, by Kellogg, Rose & Smith, his attorneys, and filed in the said court a notice of appeal and return thereto from the order of the general term of the supreme court of the State of New York; and Samuel Nelson, the respondent in said action, afterwards ap-

peared in said court of appeals, by James M. Smith, his attorney, which said notice of appeal and return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said court of appeals, having heard this cause argued by Mr. Abram J. Rose, of counsel for the appellant,
88 and by Mr. Roger M. Sherman, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the general term of the supreme court appealed from herein to this court, and the same hereby is, affirmed and judgment absolute ordered against the plaintiff on the stipulation, upon costs.

And it was also further ordered that the record aforesaid and the proceedings of this court be remitted to the said supreme court thereto, to be proceeded with according to law.

Thereupon, it is considered that the said order be affirmed and judgment absolute ordered against plaintiff, etc., with costs as aforesaid.

And hereupon, as well a notice of appeal and return thereto aforesaid, as the judgment of the court of appeals aforesaid by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

GORHAM PARKS,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *Dec.* 18*th*, 1894.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

GORHAM PARKS, *Clerk.*

A copy.
[SEAL.] HENRY D. PURROY, *Clerk.*

89 At a general term of the supreme court of the State of New York for the first judicial department, held at the court-house, in the city of New York, on the 30th day of June, 1893.

Present: Hon. Charles H. Van Brunt, presiding justice; Hon. David L. Follett, Hon. George C. Barrett, justices.

DENNIS MOLONEY, Plaintiff and Respondent,
against
SAMUEL NELSON, Defendant and Appellant.

The appeal by the defendant Samuel Nelson from the judgment of foreclosure and sale entered in the above-entitled action on the 28th day of October, 1892, in favor of the plaintiff and against the defendant, Samuel Nelson, coming on to be heard;

After hearing James M. Smith, Esq., counsel for Samuel Nelson,

defendant and appellant, and Abram J. Rose, Esq., counsel for plaintiff and respondent, and due deliberation being had thereon;

It is ordered, that the said judgment appealed from be, and the same hereby is, reversed and a new trial ordered, with costs to the appellant to abide the event of the action.

90 DEFENDANTS' EXHIBIT No. 3.

Deed, Adams and Wife to Mead.

This indenture made this 2d day of May, 1895, between Albert J. Adams and wife, of the city, county and State of New York, parties of the first part; and Isabella Mead, of the same place, party of the second part,

Witnesseth, that the said parties of the first part in consideration of one dollar lawful money of the United States paid by the party of the second part do hereby grant and release unto the said parties of the second part, their heirs and assigns forever, all—. Whereas the deed given by Albert J. Adams and wife to Isabella Mead of the premises hereinafter described, has been lost and whereas said Mead is desirous to have a deed to her a matter of record, this conveyance is made to take the place of the lost deed which was executed in January, 1892.

All that lot of land in the city of New York bounded as follows: Beginning at the corner formed by the intersection of the southerly side of 131st street with the westerly side of 10th avenue, running thence southerly along the westerly side of Tenth avenue 24 feet, 11 inches; thence westerly parallel with 131st street 100 feet; thence northerly parallel with Tenth avenue 24 feet 11 inches to the southerly side of 131st street; and thence easterly along the southerly side of 131st street 100 feet to the point or place of beginning be the same more or less. Also all that certain other lot of land in the city of New York situated on West Fifty-second street, and known and distinguished as street number 416, being on the south side of Fifty-second street and between Ninth and Tenth avenues, which said last-mentioned lot is described as follows: Beginning at a point on the southerly side
91 of Fifty-second street, distant 200 feet westerly from the westerly side of Ninth avenue; running thence southerly parallel to Ninth avenue, 100 feet 5 inches; running thence westerly parallel to Fifty-second street, 25 feet; running thence northerly again parallel to Ninth avenue, 100 feet 5 inches, to the said southerly side of Fifty-second street; running thence easterly and along said southerly side of Fifty-second street, 25 feet, to the point or place of beginning, together with the appurtenances and all the estate and rights of the parties of the first part in and to said premises. To have and to hold the above-granted premises unto the said party of the second part, her heirs and assigns forever, subject to all incumbrances upon said property. And the said parties of the first part do covenant with the said party of the second part as follows: First, that the parties of the first part are seized of the

said premises in fee-simple, and have good right to convey the same. Second, that the party of the second part shall quietly enjoy the said premises. Third, that the said premises are free from encumbrances. Fourth, that the parties of the first part will execute or procure any further necessary assurance of the title to said premises. Fifth, that the parties of the first part will forever warrant the title to said premises.

In witness whereof, the said party of the first part have hereunto set their hands and seals, the day and year first above written.

ALBERT J. ADAMS. [L. S.]
ISABELLA V. ADAMS. [L. S.]

In presence of—
JOHN C. R. ECKERSON.

STATE OF NEW YORK, *City and County of New York*, } *ss:*

92 On the 2d day of May, 1895, before me personally came Albert J. Adams and Mary Adams, his wife, to me personally known to be the individuals described in and who executed the within conveyance, and severally acknowledge to me that they executed the same.

JOHN C. R. ECKERSON,
Notary Public (*No.* 38), *N. Y. Co.*

Indorsed: To be indexed against block number 1985 on the land map of the city of New York. Recorded preceding at request of James M. Smith, May 3d, 1895, at 10.35 a. m. Ferdinand Levy, register.

DEFENDANTS' EXHIBIT No. 4.

Supreme Court.

DENNIS MOLONEY, Plaintiff, *against* SAMUEL NELSON ET AL., Defendants. } Affidavit of Defendant Nelson Made on First Trial.

CITY AND COUNTY OF NEW YORK, *ss:*

Samuel Nelson, being duly sworn, deposes and says, he is the defendant above named and signed the answer. That he discovered, for the first time, on the 7th instant, in consulting with his counsel preparing for trial, that a certain part of the answer is inaccurate and does not state the facts as deponent intended and supposed it did, and so informed his counsel on hearing said part of
93 answer read to him, and desires to correct and amend the same. That deponent is informed that the case was set down for the seventh instant, but was not reached for trial, and that the case will be on the day calendar in part II of the special term on the 17th instant, and that an order to show cause is desired for that reason at a less notice than eight days why the defendants' answer should not be corrected and amended as follows:

For a further and separate answer to said complaint this defendant says that previous to the execution of the bond and mortgage hereinbefore referred to he was solicited by said O'Brien's friends to become his bondsman, who was then in the Albany county prison. That the plaintiff signed said bond with the defendant upon the condition, as defendant is informed and believes, that the plaintiff should be paid $1,000 in cash for so doing, and given security for any amount he should pay if said O'Brien failed to appear and abide the order of the court as hereinbefore stated. That said sum of $1,000 was paid to said plaintiff, as defendant is informed and believes. That after the release of said O'Brien this defendant, at the request of said plaintiff, executed some papers, which he believes are the bond and mortgage set out in the complaint.

And for such further and other relief as may be proper in the premises.

That no previous application has been made for the order, as deponent is advised and believes.

SAMUEL NELSON.

Sworn to before me, this 15th day of October, 1892.

L. B. HASBROUCK,
Notary Public, N. Y. Co.

94 Pursuant to section 3301 of the code of civil procedure we hereby stipulate that the foregoing copies of the judgment-roll, notice of appeal and case and exceptions in this action — on file in the office of the clerk of the city and county of New York.

KELLOGG, ROSE & SMITH,
Attorneys for Respondent.
JAMES M. SMITH,
Attorney for Appellant.

The following case contains all the evidence in the case.

95 It is hereby consented that the foregoing is the case and exceptions on appeal as settled and that the same may be ordered on file.

Dated July 8th, 1896.

JAMES M. SMITH,
Attorney for Appellant.
KELLOGG, ROSE & SMITH,
Attorney- for Respondent.

Ordered on file accordingly.

Dated July 8th, 1896.

HENRY R. BEEKMAN, *J. S. C.*

The certificate of the clerk as to the settling and filing of the case is hereby waived.

Dated July 8th, 1896.

KELLOGG, ROSE & SMITH,
Attorney- for Respondent.
JAMES M. SMITH,
Attorney for Appellant.

96 At a stated term of the appellate division of the supreme court of the State of New York, first department, held at No. 111 Fifth avenue, in the city of New York, on the 11th day of December, 1896.

Present: Hon. Charles H. Van Brunt, presiding justice.
" William Rumsey,
" Pardon C. Williams,
" Edward Patterson,
" George L. Ingraham,
} Justices.

DENNIS MOLONEY, Plaintiff and Respondent,
against
SAMUEL NELSON and Others, Defendant- and Appellant-.

The appeal by the defendant from the judgment and decree entered in this action on the 2d day of May, 1896, in favor of the plaintiff and against the defendants, coming on to be heard; after hearing William H. Newman, Esq., of counsel for defendant- and appellant-, and L. Laflin Kellogg, Esq., of counsel for plaintiff and respondent, and due deliberation having been had thereon,

Now, on motion of Kellogg, Rose & Smith, attorneys for plaintiff and respondent,

It is ordered that the said judgment and decree appealed from be and the same are hereby affirmed with costs.

Ent.

(S'g'd) C. H. VAN BRUNT.

97 New York Supreme Court, City and County of New York.

DENNIS MOLONEY
against
SAMUEL NELSON.

The appeal by the defendant Samuel Nelson, from the judgment and decree in the above-entitled action, having been heard at a stated term of the appellate division of this court and an order of said appellate division having been made affirming said judgment and decree,

Now, on motion of Kellogg, Rose & Smith, attorneys for plaintiff and respondent,

It is adjudged that the judgment and decree entered in this action on the 2d day of May, 1896, in favor of the plaintiff and against the defendant be and the same are hereby affirmed;

And it is further adjudged that the plaintiff and respondent have and recover judgment against the defendant, Samuel Nelson, for the sum of one hundred and five $\frac{44}{100}$ dollars, his costs and disbursements on said appeal.

Dated New York, December 18th, 1896.

Ent.

(Signed) HENRY D. PURROY, *Clerk.*

98 New York Supreme Court, City and County of New York.

DENNIS MOLONEY, Plaintiff and Respondent,
against
SAMUEL NELSON, Defendant and Appellant.

You will please take notice that the defendant, Samuel Nelson, hereby appeals to the court of appeals from the judgment and order of affirmance of the appellate division, with $105.34 costs, entered in the office of the clerk of the city and county of New York, on the 18th day of Decembeer, 1896, affirming the judgment of foreclosure in this action, at special term of the supreme court, and entered in the office of the clerk of the city and county of New York on the 2d day of May, 1896, and from each and every part of said order and judgment.

JAMES M. SMITH,
Attorney for Appellant.

To Messrs. Kellogg, Rose & Smith, attorneys for respondent, and to Henry D. Purroy, Esq., clerk of the city and county of New York.

STATE OF NEW YORK,
City and County of New York, } ss:

99 I, Henry D. Purroy, clerk of the said city and county, and clerk of the supreme court of said State for said county,

Do certify, that I have compared the preceding with the original certified copy appellate division, order, judgment and notice of appeal, Dennis Moloney *vs.* Samuel Nelson, on file in my office, and that the same are correct transcripts therefrom, and the whole of such originals.

In witness whereof, I have hereunto subscribed my [SEAL.] name and affixed my official seal, this 24th day of December, 1896.

(S'g'd) HENRY D. PURROY, *Clerk.*

100 Supreme Court, Appellate Division, First Department.

NOVEMBER, 1896.

Chas. H. Van Brunt, P. J.; William Rumsey, Pardon C. Williams, Edward Patterson, George L. Ingraham, JJ.

DENNIS MALONEY, Respondent,
vs.
SAMUEL NELSON, Impleaded with Others, Appellant. } No. 832.

Appeal from judgment entered at special term.

Mr. W. H. Newman, for the appellant.
Mr. L. Laflin Kellogg, for the respondent.

RUMSEY, *J.:*

The action was brought against the appellant with other defendants to foreclose a mortgage and upon the trial the plaintiff suc-

ceeded. From the judgment entered after that trial, the defendant Nelson, who gave the mortgage appeals. For the purpose of sustaining his contention upon the appeal he makes several objections which will be considered in their order.

In the first place he says that the contract was void as against public policy. The facts are that just before the giving of the bond and mortgage, one O'Brien had been arrested for a felony
101 and held to bail in the sum of $10,000. The defendant Nelson, intended to go upon his bond, but it was necessary to procure another surety, and by way of inducing him to do so, Nelson offered to give him this bond and mortgage as indemnity for any liability which he might incur, whereupon he became one of the bail for O'Brien, and then this bond and mortgage was given by Nelson. The indemnity bond recited that Moloney had signed the bail bond for O'Brien as one surety in the penal sum of $10,000 with the usual conditions for the appearance of O'Brien, and then continued, "Now, therefore, if there shall be no default in said bond or recognizance so signed by said Moloney, then this obligation to be void, and otherwise to remain in full force and virtue." The bond and mortgage therefore, as it will be seen, were made by one surety upon the undertaking of bail to indemnify the other surety against the failure of the principal to appear.

The claim of the defendant is that such a contract is void as against public policy. His contention is substantially that the object for which bail is required is to assure the appearance of the prisoner to answer to the charge against him; that by accepting the custody of the prisoner he is transferred from the State to the sureties upon the recognizance, who, because of the pecuniary liability resulting from his escape, have a direct personal interest in securing his appearance; that this personal interest is diminished or taken away if they are permitted to indemnify themselves against the loss resulting from his failure to appear, and, therefore, such an indemnity impairs the effect of the contract which they have made. A contract is said not to be enforceable because it is against public policy, either because it is directly in violation of some provision of law, or because the courts can see that its necessary result is to undermine public morals; to endanger the public health or public safety; to prevent competition at judicial
102 sales, or to improperly influence legislation or the action of public officers for the administration of justice, or to nullify the policy of the law. Unless something of this kind can be necessarily predicated of a contract, it does not interfere with the broad liberty which every person has to make such agreement as he sees fit, and a contract thus made will be enforced by the courts. The question whether such a contract as this one is void has been presented to the courts of England in several reported cases, but in only one of them was it a necessary point to be decided in the case. In the case of Jones *vs.* Orchard (16 C. B., 614), the court consider the question somewhat, but leave it undecided, saying simply that while it was inclined to consider the point well taken, it was not necessary to come to a decision upon it. In Chips *vs.* Hartnell

(4 B. and S., 414), the action was upon a contract of a third person to indemnify the surety upon a bail bond. The question decided was simply that such a contract was not void by the statute of frauds and the plaintiff was permitted to recover upon the contract without any reference to the question whether it was void as against public policy. In Herman *vs.* Jeuchner (15 Q. B. Div., 561), the plaintiff had been required to give bond in the penalty of fifty pounds sterling, with a surety, for his good behavior for two years. In order to induce defendant to give security for him, plaintiff deposited with the defendant the penalty of the bond. He afterwards sued to recover the penalty back again, and the defense was that the agreement was void as against public policy, and for that reason the court would not aid either of the parties, and so permit the plaintiff to recover back the money which he had deposited in part performance of the illegal contract. The court adopted this view of the case and refused to permit the plaintiff to recover.

103 The ground upon which the case was decided seems to be that the object of the law in requiring a surety upon a recognizance, was to obtain the personal responsibility of the surety, and to require him to exercise it at the peril of pecuniary loss if he did not, and that his obtaining an indemnity removed the inducement for his personal vigilance and therefore deprived the State of the security which it was intended to have for the performance of the law by the principal.

In this country the point has been taken in several cases, but in none of them does it seem to have been decided, or even necessary to the decision of the case. In United States *vs.* Simmons (47 Fed. Rep., 577) the judge refused to approve of a bail bond, where it appeared that the sureties had been indemnified by the accused and others, for the reason that such a contract of indemnity was illegal, giving substantially the same reason as that suggested above.

In United States *vs.* Rider (110 U. S., 729), the question was discussed but not decided, because a decision upon that point was not necessary. It was, however, suggested there that a contract of indemnity by the principal to the surety was illegal. In Anderson *vs.* Spence (72 Ind., 315), the only point decided was that a contract of indemnity made by a party other than the accused, was not within the statute of frauds, and, therefore, that a parol contract was valid.

The question seems to have been presented in Simpson *vs.* Richards (35 Ca., 180) and it was decided there that the contract was valid.

No decision upon the subject is to be found in the courts of this State. In view of the fact that contracts for the indemnity of sureties upon bail bonds have been frequently enforced in the courts, the fact that their validity has not been successfully attacked is of itself strong evidence that they have presumed to be legal. In fact there is no case holding that a contract made by a third

104 party to indemnify a surety upon a recognizance, is illegal, but all such contracts have been sustained. The only case in which there has been a suggestion that such contracts are in-

valid is where they have been made by the principal himself. It is not perceived that there is any valid distinction in principle between a contract made by the accused and one made by somebody else for his benefit, but nevertheless that distinction seems to exist in the books and to result in contracts on the one hand being held valid, and on the other hand being disapproved.

In this State, however, it is quite clear that there is no public policy which condemns such contracts. The legislature have regulated by statute the giving of bail in criminal cases, and if the sureties were not to be permitted to indemnify themselves it is quite probable that the legislature would have said so. Not only have they not said so but it is not necessary to be inferred from the present condition of the law, that the contract of bail need not depend upon the personal responsibility of the surety, because the legislature permit bail to be given not only by a recognizance signed by sureties in the old manner, but also by the deposit of money by the accused. Such a mode of giving bail necessarily does away with any idea of personal liability, and it is fairly to be inferred that such personal liability was not regarded by the legislature as of such importance that it was to be insisted upon in all cases. It is not therefore necessarily a part of the policy of the law that such liability must exist, and a contract which relieves the bail from that liability is not necessarily illegal.

The next point made by the defendant is that this question has already been decided in his favor by a judgment of the court of appeals. The facts bearing upon that question are that after the escape of O'Brien and the forfeiture of his bail bond, and
105 before the plaintiff had been called upon to pay any money, he brought an action to foreclose the mortgage, basing his right to do so solely upon the fact that he had become liable to pay, although it was conceded that he had not yet paid anything by reason of having signed the bond. At special term he recovered, but the judgment was reversed at general term and a new trial ordered for the sole reason that the bond and mortgage being simply a contract for indemnity there could be no recovery upon it until the plaintiff had been actually indemnified by the payment of the money and therefore the action was prematurely brought. From the order granting a new trial the plaintiff appealed to the court of appeals, giving the usual stipulation for judgment absolute in case the order was affirmed by the court of appeals, and thereupon after affirmance judgment absolute was entered against him in that action, dismissing the complaint. The defendant now relies upon that judgment as an adjudication here against the right of the plaintiff to recover in any event. The rule is that where the plaintiff has been defeated in an action because the first suit was prematurely brought, the judgment entered in that suit is not a bar to another action brought after the right of action has accrued (Converse *vs.* Sickles, 146 N. Y., 200, 207; Rose *vs.* Hawley, 141 N. Y., 366). The defendant does not dispute this proposition, but he says that the adjudication becomes a bar in this case because of the stipulation of the plaintiff that if a new trial was ordered in

that action, judgment absolute might be entered against him, and his claim is that that judgment took away his right to recover not only in the action in which the judgment was entered but upon every other possible state of facts which might be presented with regard to the same bond and mortgage. The stipulation was required by the statute. It is contained in the notice of appeal and is substantially that the plaintiff stipulates and agrees that
106 if the order of the general term granting a new trial shall be affirmed, judgment absolute shall be rendered against the plaintiff in favor of the defendant.

It will be noticed that this stipulation is made in the action in which the appeal is taken. It refers simply to that action and the effect of it is only to give the respondent in whose favor the new trial was ordered, the same judgment without a new trial, which he would have if a new trial had taken place in pursuance of the order of the general term. It is the same thing in effect, as though upon the new trial the plaintiff had said in open court that in view of the law laid down by the appellate court he could not recover a judgment in the action in which the order was made and for that reason consented that judgment might be taken against him, so that in any event the force of adjudication after a judgment absolute upon such a stipulation, depends upon the facts upon which the judgment is ordered, and the fact that the judgment comes by stipulation makes no difference with the binding effect of the judgment which is finally entered. It is quite true that where such stipulation has been given the courts say that if the order for a new trial is affirmed, the judgment entered upon the stipulation finally determines the whole right of the defeated party and that although he may have had a good cause of action he loses it because of his stipulation, although the new trial may have been ordered upon a point which was not necessarily decisive of it. It will appear from those cases when they are examined that the court was speaking simply with reference to the facts stated in the pleadings in the particular case, and the remark was made, not by way of deciding upon the rights, but simply by way of admonition to the appellant as to the risk which he took in entering into such a stipulation, where the new trial might have been granted for an error
107 of the court which did not go at all to the merits of the case. None of the cases hold or suggest that the judgment entered upon such a stipulation is to be construed as finally disposing of any rights which were not necessarily involved in the pleadings set out in the particular case. To be sure in the case of Rose *vs.* Hawley (*supra*) this question was presented to the court of appeals, which declined to decide it because it was not necessary to that case or which was not in existence at the time the first action was commenced. But there is nothing in the opinion from which it can be inferred that the court would have decided it in favor of the defendant's contention here, and we can see no ground upon which that contention can be maintained.

The third point made by the defendant is that the bond and mortgage was without consideration. That point however is dis-

posed of by the learned trial judge, who finds upon sufficient evidence that before the recognizance was given it was agreed that Nelson should give indemnity to Moloney as a condition of his going upon the bond.

This disposes of all the objections taken by the defendant to the judgment, and it necessarily results that the judgment must be affirmed.

Judgment affirmed with costs.

All concur.

108 At a special term, part II, of the supreme court, held at the court-house, in the city of New York, on the 4th day of March, 1899.

Present: Hon. Miles Beach, justice.

DENNIS MOLONEY, Plaintiff & Respondent,
against
SAMUEL NELSON, Defendant & Appellant.

The defendant in this action having appealed from the judgment of the appellate division of the supreme court in the first department, entered in the office of the clerk of this court on the 18th day of December, 1896, affirming the judgment of foreclosure entered in this action at special term of said supreme court, entered in the office of the clerk of said court on the 2nd day of May, 1896, in favor of the plaintiff and against the defendant, and the remittitur from the court of appeals having been sent down, whereby it appears that the judgment appealed from by the defendant was in all things affirmed by the said court of appeals with costs, and that court having directed that the record and proceedings be
109 remitted to this court and this court directed to enforce said judgment of the court of appeals according to law:

Now, on reading and filing the said remittitur, on motion of Kellogg, Rose & Smith, attorneys for the plaintiff and respondent—

It is ordered that the said judgment of the said court of appeals be, and the same is hereby, made the judgment of this court, and that the plaintiff have judgment and execution against the defendant for the costs of said appeal when adjusted by the clerk of this court.

Ent.

MILES BEACH, *J. S. C.*

110 [Endorsed:] Copy. N. Y. supreme court, New York county. Dennis Moloney against Samuel Nelson. Order on remittitur and notice of entry. Kellogg, Rose & Smith, att'ys for pl'ff, 120 Broadway, New York. Copy received Mar. 7, 1899. A. J. Adams, Jr.

Due and timely service of a copy of within order & notice is hereby admitted.

Dated New York, Mar. 7th, 1899.

____ ____,
Attorney for Def't.

SIR: You will please take notice that an order, of which the within is a copy, was this day duly entered in the office of the clerk of this court, at the court-house, in the borough of Manhattan, in the city of New York.

Dated New York, Mar. 4th, 1899.

Yours, &c., KELLOGG, ROSE & SMITH,
Att'ys for Pl'ff, 120 *Broadway, New York City.*

111 New York Supreme Court, County of New York.

DENNIS MOLONEY, Plaintiff & Respondent,
against
SAMUEL NELSON, Defendant & Appellant.

Judgment of foreclosure in this action in favor of the plaintiff and against the defendant having been rendered in this court on the 2nd day of May, 1896, and the defendant having appealed from said judgment to the appellate division of the supreme court in the first department, and the said judgment having been in all things affirmed by said appellate division, and judgment of affirmance having been rendered thereon on the 18th day of December, 1896, and that the plaintiff recover against the defendant the sum of one hundred and five dollars and thirty-four cents ($105.34), costs of said appeal, and the defendant having appealed therefrom to the court of appeals, and the said court of appeals having sent hither its remittitur, filed herein on the 4th day of March, 1899, by which it appears that the said court of appeals has affirmed the said judgment in all things, with costs, and has given judgment accordingly, and has remitted the judgment of said court of appeals to this court to be enforced according to law, and this court
112 having, by an order entered herein the 4th day of March, 1899, ordered that said judgment of the court of appeals be made the judgment of this court, with costs, and the costs of said appeal having been adjusted by the clerk of this court at the sum of $127.18:

Now, on motion of Kellogg, Rose & Smith, attorneys for the plaintiff—

It is adjudged that the judgment of the court of appeals be, and the same is hereby, made the judgment of this court, and that the plaintiff, Dennis Moloney, have judgment against the defendant, Samuel Nelson, for the sum of $127.18, his costs, as taxed by the clerk of this court, and have execution against the said defendant, Samuel Nelson, therefor.

Dated New York, March 7th, 1899.

WM. SOHMER, *Clerk.*

113 [Endorsed:] Copy. N. Y. supreme court, New York county. Dennis Moloney against Samuel Nelson. Copy. Judgment and notice of entry. Kellogg, Rose & Smith, att'ys for pl'ff, 120 Broadway, New York. Copy received Mar. 7, 1899. A. J. Adams, Jr.

Due and timely service of a copy of within judgment and notice is hereby admitted.

Dated New York, March 7th, 1899.

——— ———,
Att'y for Def't.

SIR: You will please take notice that a judgment, of which the within is a copy, was this day duly entered in the office of the clerk of this court, at the court-house, in the borough of Manhattan, in the city of New York.

Dated New York, March 7th, 1899.

Yours, &c., KELLOGG, ROSE & SMITH,
Att'ys for Pl'ff, 120 Broadway, New York City.

114 DENNIS MOLONEY, Respondent,
v.
SAMUEL NELSON, Appellant.

(Decided February 28, 1899.)

Appeal from a judgment of the appellate division, first department, affirming a judgment entered upon trial at special term.

Wm. H. Newman, for appellant.
L. Laflin Kellogg, for respondent.

PARKER, *Ch. J.:*

By the judgment under review a mortgage given by the appellant Nelson was foreclosed. The defenses interposed by him upon the trial, and relied upon here, are:

1. The stipulation given by the plaintiff on the appeal to this court in a prior action brought to foreclose the mortgage is a bar to the recovery in this action.

2. The bond and mortgage having been given to indemnify bail in a criminal case, they are void, because contrary to public policy.

The essential facts are that Nelson offered himself as bail for one O'Brien, who had been arrested for a felony and held to bail in the sum of $10,000; that another surety was required, and Nelson, in order to induce the plaintiff Moloney to unite in the execution of the bail bond, executed and delivered to him the bond and mortgage in suit. The bond contained the usual conditions, and in addition thereto the following: "Now, therefore, if there shall be no default in said bond or recognizance, so signed by said Moloney, then this obligation to be void, otherwise to remain in full force and virtue."

A prior action to foreclose this mortgage was brought by the plaintiff and judgment of foreclosure therein was obtained, at special term. The general term ordered a reversal of that judgment, and from that order the plaintiff appealed to this court, giving the usual stipulation for judgment absolute in the event of an affirmance. This court affirmed the order of the general term (*Maloney v. Nelson*, 144 N. Y., 182), and judgment absolute was accordingly entered

against the appellant, with costs. The reason for refusing foreclosure in that action was that the action was prematurely brought, as the plaintiff had not paid any portion of the amount named in the bail bond, and hence, as this court construed the conditions, the bond was not due. Subsequently the plaintiff made payment, and immediately thereafter this action was commenced.

The defendant recognizes the existence of the rule that where a plaintiff has been defeated in an action because he brought it prematurely, the judgment entered therein is not a bar to a subsequent suit brought after the right of action has accrued (*Converse v. Sickles*, 146 N. Y., 200, 207; *Rose v. Hawley*, 141 N. Y., 366), but insists that the stipulation given on the appeal to the court of appeals from the order of the general term operates to prevent a recovery. This contention is without support in authority or reason. The stipu-
115 lation was that in case of affirmance judgment absolute should be rendered against the appellant in that action, not in some other action, the right to commence which had not yet accrued. If, instead of taking an appeal to the court of appeals, he had taken the new trial ordered by the general term, the result necessarily would have been a dismissal of his complaint, and a judgment thereon against him would have been affirmed on appeal. Had that been the course of action, the appellant admits that the judgment entered thereon would not have been a bar to a recovery in this action. It is readily apparent that the course pursued did not widen the effect of the judgment or so broaden it that it shall impress causes of action not yet in existence. The object of giving the stipulation was to shorten the procedure by which a decision of the court of appeals was to be had upon a question that lay at the very foundation of the action, viz: Under the conditions of the bond and the subsequent happenings, had a right of action thereon accrued to the plaintiff at the time of the commencement of the suit? The stipulation was in the form required by the statute, and it could not secure to the appellant giving it, other rights, or burden him with greater obligations than were within the contemplation of the statute, which is, that judgment absolute in the action in which the stipulation was given should be rendered against him in case the order he appealed from should be affirmed. A judgment in that action, as we have already observed, could not affect the right to bring this one, which is upon a cause of action not then in existence.

The case of *Roberts v. Baumgarten* (126 N. Y., 336) is not in conflict with the views we have here expressed. That was an action for ejectment, and the plaintiff was entitled under the statute to two trials in the same action. The plaintiff had judgment in the trial court, but being reversed in the general term he appealed to the court of appeals, giving the stipulation for judgment absolute, and the court held that the effect of that was to waive the right to a second trial. The reason of that decision was that, as the statute provided that the plaintiff might have two trials for one cause of action, he necessarily waived his right to a second trial by stipulating for judgment absolute.

As to the second ground relied upon to defeat the action, viz.,

that the bond and mortgage were void as against public policy, the question is an open one in this State, so far as decision is concerned, but the view of this court was expressed in *Maloney v. Nelson* (*supra*). The court said: "This leaves it unnecessary to consider the other defenses set up in the answer of the defendant Nelson, although we must say that the claim that the defendant's contract was void as against public policy, does not impress us as being a good defense, at least in this State." It is true that in some other jurisdictions, as is pointed out in the very careful opinion of the appellate division, it has been suggested, if not decided, that it is against public policy to allow bail to become indemnified, the reason
116 given being that the object for which the bail is required is to assure the appearance of the prisoner to answer the charge against him, and that necessarily the bail had a direct pecuniary interest in preventing the escape of the prisoner, which he would not have were he fully indemnified. That is not the public policy of this State; for the giving of bail in criminal cases is regulated by statute, and the legislature has, by its provisions, provided that a personally responsible surety may be altogether omitted if the accused prefers to make a deposit of money; he may have his choice either to give a bond with sureties, or make a deposit of money. It is the loss of the money deposited, or the assurance that the sureties will be obliged to pay the amount of the bail, that is relied upon to secure the presence of the accused. It, therefore, cannot be said to be a part of the public policy of this State to insist upon personal liability of sureties, for there need not be such personal liability in any case if the accused make a deposit of money in lieu of bail, as provided by the statute.

The judgment should be affirmed, with costs.

All concur.

Judgment and order affirmed.

A copy

E. H. SMITH, *Reporter*.
C.

[Endorsed:] Moloney *v.* Nelson. Parker, Ch. J. 1.10.

117 (Copy.)

UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the judges of the supreme court of the State of New York, being possessed of the record and proceedings upon a remittitur from the court of appeals of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Samuel Nelson, defendant and appellant, and Dennis Moloney,

plaintiff and respondent, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said defendant and appellant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

118

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 27th day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

(Signed) JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
(Signed) R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

M'ch 27, '99.

[Endorsed:] Supreme Court of the United States. Dennis Moloney *vs.* Samuel Nelson. Copy. Writ of error. Albert J. Adams, Jr., attorney for appellant, 71 Broadway, New York city.

A copy of the within paper has been this day received at the office of Kellogg, Rose & Smith. Apr. 1, 1899. Kellogg, Rose & Smith, 120 Broadway, N. Y.

To Kellogg, Rose & Smith, att'ys for respondent, 120 Broadway.

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All which we have caused by these presents to be exemplified and the seal of our said supreme court to be hereunto affixed.

Witness Hon. Charles H. Truax, a justice of the supreme court for the county of New York, the third day of April, in the year of our Lord one thousand eight hundred and — -nine, — of our Independence the one hundred and twenty-third.

[SEAL NEW YORK.] WM. SOHMER, *Clerk.*

I, Charles H. Truax, a presiding justice at a special term of the supreme court of the State of New York for the county of New York, do hereby certify that William Sohmer, whose name is subscribed to the preceding exemplification, is the clerk of the said county of New York and clerk of said supreme court for said county, duly elected and sworn, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said supreme court, and that the attestation thereof is in due form.

Dated New York, April 3rd, 1899.

CHARLES H. TRUAX,
Justice of the Supreme Court of the State of New York.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

I, William Sohmer, clerk of the supreme court of said State in and for the county of New York, do hereby certify that Hon. Charles H. Truax, whose name is subscribed to the preceding certificate, is presiding justice at a special term of the supreme court of said State in and for the county of New York, duly elected and sworn, and that the signature of said justice to said certificate is genuine.

In testimony whereof I have hereunto set my
Seal New York. hand and affixed the seal of the said court this 3rd day of Ap'l, 1899.

WM. SOHMER, *Clerk.*

[10-cent U. S. internal-revenue stamp, canceled Apr. 3, 1899, W. S.]

120 [Endorsed:] Supreme Court of the United States of America. Samuel Nelson, def't, app'l'nt, against Dennis Moloney, pl'ff, resp'd't. Return to writ of error. Kellogg, Rose & Smith, att'ys for pl'ff, resp'd't, 120 Broadway, New York.

Endorsed on cover: File No., 17,352. New York supreme court. Term No., 767. Samuel Nelson, plaintiff in error, *vs.* Dennis Moloney. Filed April 5th, 1899.

Supreme Court of the United States.

October Term, 1888.

SAMUEL WELSON,

Plaintiff in Error,

vs.

DENNIS MOLONEY,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS OR AFFIRM.

ALBERT J. ADAMS,

Attorney for Plaintiff in Error.

THE H. REYNAR,

Of Counsel.

IN THE

Supreme Court of the United States.

SAMUEL NELSON,
Plaintiff in error,

against

DENNIS MOLONEY,
Defendant in error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This is a motion to dismiss the writ of error allowed by Mr. Justice Peckham, to review the judgment entered in this action on the 6th day of March, 1899, in the office of the Supreme Court of the State of New York ; and also to review the jurisdiction of the State Court to try this action on the ground that the cause had been removed from the State Court to the Circuit Court of the United States, prior to the filing of the answer, and also to review, if permissible, the order of the Circuit Court Judge in remanding the cause back to the State Court.

Prior to the commencement of this action the

plaintiff in error, who had been a resident and citizen of the State of New York, changed his residence and citizenship to the State of New Jersey.

See papers on Removal.

After the complaint was served the plaintiff in error filed his petition, accompanied by a bond, in the State Court which were approved and allowed by a Justice of the Supreme Court ; subsequently, after the removal of the cause to the Circuit Court of the United States, the defendant, Samuel Nelson served and filed his answer in the Circuit Court of the United States.

See Record, p. 10.

At the same time the defendant Albert J. Adams, served and filed his separate answer in the Circuit Court of the United States, in which he sets out that in the month of November, 1891, he purchased of said defendant, Samuel Nelson, the property described in the complaint, being the property in question ; that he subsequently discovered that there was a *lis pendens* filed that affected said premises, and that he thereupon executed and delivered a deed thereon at the request of the plaintiff in error to a person by the name of Mead, full name the defendant does not recollect, and also that this defendant has no interest in the property referred to in this action.

Nelson's answer was verified April 1st, 1895 ; answer of Adams was verified on the 30th day of March, 1895.

On the 2d day of May, 1895, the defendant Adams and wife, executed and delivered to one Isabella Mead another deed for the same premises, for the reason that the first deed had been

mislaid or lost and not recorded, for the purpose of perpetuating the deed first given, which deed was duly recorded in the office of the Register of the City and County of New York on May 3d, 1895.

See Record, folios 268-275.

Immediately after the order of remand was made the plaintiff in error applied to said Circuit Court Justice for an allowance of appeal to the Supreme Court, from the order entered remanding the cause, which said Judge declined to allow in the memorandum as follows: "No appeal from order remanding can be allowed; Sec. 2, Act of 1897. E. H. L."

By leave of Justice Lacomb the counsel for the plaintiff in error applied to the Justice of the Supreme Court, assigned to this circuit for an allowance of appeal, but said Justice declined to allow the appeal upon the ground that no appeal could be taken until after final judgment in the action.

ARGUMENT.

Point I.

The filing of the petition and bond, as required by the United States statute, in the State Court, and the allowance of the same, divested the State Court of all jurisdiction in the case, and the jurisdiction was transferred to the Circuit Court of the United States. This proposition has been so often decided and enunciated in the Supreme Court that

it is hardly necesssary to cite any decisions to that effect.

100 U. S., 375.
Insurance Co. *vs.* Dunn, 19 Wall., 214.
R. R. Co. *vs.* Koontz, 104 U. S., 14.

This case announced that it is a well-settled rule of decision in this Court that when a sufficient case for removal is made in a State Court, the rightful jurisdiction of that Court comes to an end, and no further proceedings can be properly had there, unless in some form its jurisdiction is restored.

The remanding of the case back to the State Court was error.

Memorandum of Judge Lacombe on remanding the cause from the Supreme Court of the United States to the Supreme Court of the State of New York: "The propriety of the removal is to be tested by the bill, not by the individual defenses to it. In a suit to foreclose a mortgage the original mortgage debtor and the subsequent purchaser of the property are both necessary parties, and the controversy is not separable (Ayers *vs.* Wiswell, 112 U. S., 187). As Adams, the subsequent purchaser, is a citizen of the same State as the complainant, the cause must be remanded. E. J. L."

Adams was not a necessary party to the action, as he had no interest whatever in it. The cause was therefore severable. The defendant in error could have brought an action upon the bond itself against the plaintiff in error.

On the foreclosure of the mortgage Adams was not a necessary party, and the joining of Adams in the case would not prevent the plaintiff in error from removing it.

Point II.

The writ of error in this case was allowed on the 27th day of March last, returnable within 30 days. Plaintiff in error is entitled to all that time to file the record in the Supreme Court. The defendant in error has made a motion to dismiss the writ of error, returnable on the 17th inst., several days prior to the return mentioned in the writ of error, and has brought into the Court a return and a record which is not complete; it does not contain the assignment of errors nor the petition and papers filed in the Supreme Court on the motion to remove the cause. Rule 8 requires, among other things, a certificate that the annexed papers are a true copy of the record, and of the assignment of errors, and of all proceedings in the case.

The petition for removal, when presented to the State Court, becomes part of the record of that Court. If upon the face of the petition and of the whole record of the State Court sufficient grounds for a removal are shown, the petition may be amended in the Circuit Court of the United States, by leave of that Court, by citing more fully and distinctly the facts which support these grounds.

Powers *vs.* Chesapeak, &c., R. R., 169 U. S., 101.

Point III.

The right of the plaintiff in error in this case to review in this Court on the writ of error or appeal the question of jurisdiction alone is clear, and to

review that question is the object of the writ of error in the present case.

169 U. S., 101, and cases cited.

Under the old law the pleadings only were looked at, and the rights in respect to a removal were determined solely according to the position they occupied as plaintiff and defendant in the suit. Under the new law the mere form of the pleadings may be put aside, and the parties placed on different sides of the matter according to facts.

100 U. S., 469.

Point IV.

There are numerous cases reported in the United States Reports where writ of errors have been dismissed, in which the plaintiff in error sought to review the question of the jurisdiction of the Circuit Court upon a remand, prior to a final judgment; the writs of errors have repeatedly been dismissed upon that ground alone.

Case of McLish *vs.* Roff, 141 U. S., 661. The writ of error in this case was dismissed upon the ground that it could be only taken after final judgment. It was therein sought to review the jurisdiction of the Circuit Court. The writ of error was taken under Act of March 3d, 1891, claiming that the only question and issue was the jurisdiction of the Court. The Court at page 668 says: "the true purpose of the act, as gathered from its context, is that the writ of error or appeal may be taken only after final judgment, except in the case specified in Section 7 of the act. * * * When

that judgment is rendered, the party against whom it is rendered must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction, or to the Circuit Court of Appeals upon the whole case ; if the latter, then the Circuit Court of Appeals may, if it deem proper, certify the question of jurisdiction to this Court. Chicago, St. Paul, &c. R. R. *vs.* Roberts. In this case the case last cited was affirmed and followed.

The plaintiff in error does not question the doctrine that a writ of error or appeal cannot be taken from interlocutory orders, or decisions, or judgments, not final, but must wait until the final decision in the case. But that at some time, and that time must be after the final decision and determination of the cause, the plaintiff in error may review the question of the jurisdiction of the Court in any case in which the jurisdiction of the Court is in issue.

Point V.

The defendant in error in his points has stated substantially that the Supreme Court cannot review the order of the Circuit Court remanding a case to the State Court. I have examined the decisions that he cites, and find that the rule is not as stated by the counsel for defendant in error. The rule is that the order cannot be reviewed until after final judgment.

Point VI.

The counsel for defendant in error has stated in

his brief that there is no federal question involved in this appeal. I have examined the cases cited by him and they do not apply. There is a federal question presented upon the record, when the record is complete, in which the jurisdiction of the State Court is challenged. The State Court was ousted of its jurisdiction. When the plaintiff in error complied with the law of the United States in reference to removal of cases it was error in the State Court to proceed to the trial of the case, as it was without jurisdiction. The case of R. R. Co. *vs.* Koontz the Court says: "We have uniformly held that if the State Court wrongfully refuses to give up its jurisdiction upon petition for removal, and forces a party to trial, he loses none of his rights by remaining and contesting the case on its merits. It is also a well settled rule of decision in this Court that when a sufficient cause for removal is made in a State Court, the rightful jurisdiction of that Court comes to an end, and no further proceedings can properly be had there, unless in some form its jurisdiction is restored."

It has been held in repeated cases, as I understand, that the parties by consent cannot confer jurisdiction upon the Court if the Court is otherwise without jurisdiction. The Circuit Court is without power to confer jurisdiction upon the State Court after the State Court has once lost that jurisdiction.

103 U. S., 481-492; 606.
104 U. S., 5.
19 Wall, 214.

Point VII.

The remand order, filed in the State Court, draws

with it the papers upon which it is based, and a question of the jurisdiction of both the Circuit Court and the State Court is subject to reviewal. As before stated, the plaintiff in error has preserved his right to raise the question of jurisdiction, now that final judgment in the action has been rendered. If the record brought down by the defendant in error is not the complete record, as it seems not to be, the plaintiff in error should not suffer for that. The rule in this Court provided that the plaintiff in error may docket the case and file the record on or before the return day. For failure the defendant in error may do so. If the defendant in error files a transcript or dockets the case before the time has expired, and subsequently the plaintiff in error files the transcript and dockets the case in due time, defendant's docket will be dismissed.

113 U. S., 687.

Point VIII.

The plaintiff in error raises the objection which is apparent on inspection of the record returned by the defendant in error, that the record as returned by defendant in error does not contain the assignment of errors filed by plaintiff in error, nor does it contain the petition and bond filed by plaintiff in error in the Supreme Court of the State of New York for the removal of the cause from the State to the Circuit Court of the United States nor the proceedings in the Circuit Court of the United States on the motion to remand, nor any order remanding the cause to the State Court.

Plaintiff in error contends that the present motion cannot properly be heard without prejudice to the rights of the plaintiff in error until the said record brought down by the defendant in error is corrected and he prays for leave to have such record amended and for permission to add to the record the properly authenticated papers in that behalf which the plaintiff in error has brought down and filed with the Clerk of this Court.

Point IX.

Plaintiff in error raised the question of jurisdiction in the State Court by filing his petition for removal with necessary bond. The State Court lost jurisdiction and the trial of the action subsequently raised a federal question as to the jurisdiction of the Court, cases cited on this brief. The Federal Court has sustained the defense as to the invalidity of the bond and mortgages in 110 U. S., p. 729.

The motion to dismiss should be denied.

Respectfully submitted,

Wm H. Newman,
Counsel for
Plaintiff in Error

No. 767.

Brf. of Rose for D. E. (on mo.)

Office Supreme Court U. S.
FILED
APR 17 1899
JAMES H. McKENNEY,
Clerk.

Filed April 17, 1899.

Supreme Court of the United States,

No. 767, October Term, 1898.

SAMUEL NELSON,
Plaintiff in Error,
against
DENNIS MOLONEY,
Defendant in Error.

Brief for Defendant in Error on Motion to Dismiss or Affirm.

KELLOGG, ROSE & SMITH,
For Defendant in Error.

ABRAM J. ROSE,
Of Counsel.

In the Supreme Court of the United States.

No. 767, October Term, 1898.

Samuel Nelson,
Plaintiff in Error,
against
Dennis Moloney,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This is a motion to dismiss the writ of error allowed by Mr. Justice Peckham to review the judgment entered in this action on the 6th day of March, 1899, in the office of the Clerk of the Supreme Court of the State of New York, upon the remittitur of the Court of Appeals of that State, affirming the decision below and directing final judgment for the foreclosure of a mortgage given by the plaintiff in error to the defendant in error, which was the subject of the action.

PLEADINGS.

This action was brought by the defendant in error to foreclose a mortgage on real estate for $10,000, given by the plaintiff in error on the 13th day of October, 1891, as security for a bond of even date.

The complaint is the usual one in an action to foreclose a mortgage.

See Complaint, Record, pages 3-6.

The answer of the plaintiff in error alleges the commencement of an action by the defendant in error against him to foreclose the mortgage in suit prior to the commencement of this action, in which first action final judgment had been rendered, which judgment is *res adjudicata* between the parties and a bar to this action. Also that the bond and mortgage in suit were without consideration and illegal and void on grounds of public policy.

See Answer, Record, pages 7-9.

FACTS.

Prior to the 16th day of October, 1891, one Thomas O'Brien had been indicted by the Grand Jury of Albany County for the crime of grand larceny, and on his arrest was held to bail to answer such indictment in the sum of $10,000.

The defendant in error, a resident of the State of New York, became bail with the plaintiff in error, then a resident of the State of New York, for the appearance of O'Brien (Record, pages 42-43).

To indemnify Moloney against loss by going bail for O'Brien, the bond and mortgage in suit were drawn up and

executed by the plaintiff in error and delivered to the defendant in error. The condition of the bond was that the same should be void if O'Brien should appear to answer the charge of grand larceny in whatever court he might be prosecuted for said crime, and should render himself amenable to the process of the court, and, if convicted, appear for judgment pursuant to the bail bond hereinbefore mentioned.

See Bond, Record, page 43.

The cause of the People *v.* O'Brien was called in the County Court. O'Brien did not appear and his bail was duly forfeited.

See Record, page 20.

Thereafter suit was brought against the plaintiff in error, and the defendant in error, on the recognizance, and judgment rendered against them, for the sum of $10,000 and costs.

See Record, page 20.

Execution on said judgment was thereafter issued and by a sale of Moloney's property thereunder, he paid the full amount thereof, amounting to the sum of $10,799.19.

See Record, page 45.

The plaintiff in error has paid nothing, nor did he have any property out of which the execution could be satisfied.

Prior to the commencement of this action, another suit had been brought by Moloney against Nelson upon the bond and mortgage sought to be foreclosed in this action, in

which the Trial Court gave Moloney a judgment, but upon an appeal taken to the General Term of the Supreme Court, the judgment was reversed on the ground that the suit had been prematurely brought, inasmuch as it was brought before Moloney had paid anything on account of the judgment entered on the forfeiture of the criminal recognizance.

This decision may be found reported in the official Supreme Court Reports.

Moloney *v.* Nelson, 70 Hun, 202.

From the judgment of the General Term an appeal was taken by Moloney to the Court of Appeals of the State of New York, with the usual stipulation required in cases where appeals are taken from a judgment of reversal and ordering a new trial, to the effect that if the judgment appealed from was affirmed, judgment absolute might be rendered against him on the stipulation.

The Court of Appeals affirmed the judgment and directed judgment absolute against Moloney.

The opinion of the Court in that case, written by Mr. Justice Peckham, is reported in Moloney *v.* Nelson, 144 N. Y., 182.

After the rendition of the judgment of the Court of Appeals, this action was commenced, the defendant in error having in the meantime satisfied the judgment entered on the forfeited bail bond.

Testimony Moloney, page 20; Executions, page 45.

Before the beginning of this action Nelson had transferred the property covered by the mortgage to the defendant, Albert J. Adams, who, at the time of the com-

mencement of the action, had the record title (page 16). Adams was a resident of New York State (page 54).

The Trial Court gave judgment in Moloney's favor, directing the sale of the mortgaged premises.

From that judgment Samuel Nelson alone appealed to the Appellate Division of the Supreme Court of the State of New York, in the First Department, which Court affirmed the judgment.

No appeal therefrom was taken by Adams or any of the other defendants.

The Appellate Division affirmed the judgment, and from the judgment of affirmance entered upon the order of the Appellate Division an appeal was taken by Nelson to the Court of Appeals.

The only questions which were raised in the said Court of Appeals by the plaintiff in error were:

1st. That the stipulation given by Moloney on the appeal to the Court of Appeals in the first action brought to foreclose the mortgage was a bar to the recovery in the action then before the Court.

2d. That the bond and mortgage having been given to indemnify bail in a criminal case, they were void, because contrary to public policy.

No Federal question is presented by the Record, nor was any such question argued before the Court of Appeals of the State of New York.

ARGUMENT.

POINT I.

This Court has no jurisdiction, because no Federal question was presented in the State Court for decision or review.

FIRST.—This action was brought simply to foreclose a mortgage on real estate, situated within the City, County and State of New York.

The only questions raised by the plaintiff in error upon the trial, and relied upon on his appeal to the Court of Appeals of that State, are stated in the opinion of Chief Justice Parker, to be:

"1. The stipulation given by the plaintiff on the appeal to (the Court of Appeals) in a prior action brought to foreclose the mortgage, is a bar to the recovery in this action.

2. The bond and mortgage having been given to indemnify plaintiff in a criminal case, they are void, because contrary to public policy."

See Opinion Moloney *v.* Nelson, 158 N. Y., 351.

SECOND.—As to the first question, the Court, speaking by Chief Justice Parker, said: "The defendant recognizes the existence of the rule that where the plaintiff has been defeated in an action because he brought it prematurely, the judgment entered therein is not a bar to a subsequent suit brought after the right of action has accrued (Converse *v.* Sickles, 146 N. Y., 200–207; Rose *v.* Hawley, 141 N. Y., 366), but insists that the stipulation given on the appeal to the Court of Appeals from the order of the General Term, operates to prevent a recovery. This contention is without support in authority or reason."

As to the second contention the Court treated the question as follows: "As to the second ground relied upon to defeat the action, viz., that the bond and mortgage were void as against public policy, the question is an open one in this State, so far as decision is concerned, but the view of this Court was expressed in Moloney *v.* Nelson (144 N. Y., 182). The Court said: 'This leaves it unnecessary to consider the other defenses set up in the answer of the defendant Nelson, although we must say that the claim that the defendant's contract was void as against public policy does not impress us as being a good defense, at least, in this State.' It is true that in some other jurisdictions, as is pointed out in the very careful opinion of the Appellate Division, it has been suggested, if not decided, that it is against public policy to allow bail to become indemnified, the reason given being that the object for which the bail is required is to assure the appearance of the prisoner to answer the charge against him, and that necessarily the bail had a direct pecuniary interest in preventing the escape of the prisoner, which he would not were he fully indemnified.

That is not the public policy of this State; for the giving of bail in criminal cases is regulated by statute, and the Legislature has, by its provisions, provided that a personally responsible surety may be altogether omitted if the accused prefers to make a deposit of money; he may have his choice either to give a bond with sureties, or make a deposit of money. It is the loss of the money deposited or the assurance that the sureties will be obliged to pay the amount of the bail that is relied upon to secure the presence of the accused.

It, therefore cannot be said to be a part of the public policy of this State to insist upon personal liability of sureties, for there need not be such personal liability in any

case if the accused make a deposit of money in lieu of bail, as provided by the statute."

Moloney *v.* Nelson, 158 N. Y., 351.

It is obvious, then, that the only questions presented to the Court for review were:

1st. A question relating wholly to the effect of a stipulation prescribed by the State Legislature upon an appeal from an order of the Appellate Division of the Supreme Court in that State reversing a judgment and ordering a new trial.

2d. A question as to the public policy of the State of New York respecting the indemnification of bail in criminal cases.

THIRD.—As the validity of no treaty or statute of or authority exercised under the United States, nor of a statute of or authority exercised under any State, was drawn in question, it is essential to the maintenance of the jurisdiction of this Court that it should appear that some title, right, privilege or immunity under the Constitution or laws of the United States was especially set up or claimed in the State Court, and that the decision of the highest court of the State in which such decision could be had *was against the title, right, privilege or immunity so set up or claimed.*

Chief Justice Fuller, in that regard, said that certain propositions must be regarded as settled.

"1. That the certificate of the presiding Judge of the State Court as to the existence of grounds upon which our interposition might be successfully invoked, while always

regarded with respect, cannot confer jurisdiction upon this Court to re-examine the judgment below. Powell *v.* Brunswick Board of Suprs., 150 U. S., 435–439, and cases cited.

2. That the title, right, privilege or immunity must be specially set up or claimed at the proper time and in the proper manner. Miller *v.* Texas, 153 U. S., 535; Morrison *v.* Watson, 154 U. S., 111–115, and cases cited.

3. That such claim cannot be recognized as properly made when made for the first time in a petition for rehearing after judgment. Loeber *v.* Schroeder, 149 U. S., 580–585, and cases cited.

4. That the petition for the writ of error forms no part of the record upon which action is taken here. Butler *v.* Gage, 138 U. S., 52 and cases cited.

5. Nor do the arguments of counsel, though the opinions of the State courts are now made such by rule. Gibson *v.* Chonteau, 75 U. S., 8 Wall., 314; Parmalee *v.* Lawrence, 78 U. S., 11 Wall., 36; Gross *v.* U. S. Mortgage Co., 108 U. S., 477–484; U. S. *v.* Taylor, 147 U. S., 695–700.

6. The right on which the party relies must have been called to the attention of the Court in some proper way and the decision of the Court must have been against the right claimed. Hoyt *v.* Thompson, 66 U. S., 1 Black, 518; Maxwell *v.* Newbold, 59 U. S., 18 How., 515.

7. Or, at all events, it must appear from the record, by clear and necessary intendment, that the Federal question was directly involved, so that the State court could not have

given judgment without deciding it; that is—a definite issue as to the possession of the right must be distinctly deducible from the record, before the State Court can be held to have disposed of such Federal question by its decision. Powell *v.* Brunswick Co. Bd. of Sprs., 150 U. S., 435–439."

Saywood *v.* Denny, 158 U. S., 180.

It is respectfully submitted that "Tested by these principles," as said by Mr. Chief Justice Fuller in the Saywood case (*supra*), "it is quite evident that this writ of error must be dismissed."

1st. Because no title, right, privilege or immunity under the Constitution or laws of the United States was specifically set up or claimed by the plaintiff in error in the State Court.

2d. Because the right, if any, on which the plaintiff in error purports to rely, was not called to the attention of the State Court, nor was the decision of that court against the right claimed.

3d. Because it appears by the record that no Federal question was directly involved, and no definite issue as to the possession of the right is deducible from the record before the State Court.

POINT II.

No jurisdiction to review the judgment of the State Court is conferred by reason of the diverse citizenship of the parties, even if it existed.

As pointed out in the decision in the Saywood case (*supra*), it is settled that the petition for the writ of error forms no part of the record upon which action is taken by this Court, but if the petition be referred to, it will be found that the only ground upon which the plaintiff in error claims the right to a review of the judgment of the State Court is "by reason of diverse citizenship of the appellant and respondent."

The statute allowing the removal of causes from the State courts to the courts of the United States points out specifically the method to be pursued by a party entitled to such removal and desiring to avail himself of that privilege. Diverse citizenship alone is no ground for removal to this Court for the review of a judgment by a State court.

As a matter of fact, although it does not appear by the Record, the plaintiff in error filed his petition and bond for removal of this cause from the Supreme Court of the State of New York to the United States Circuit Court for the Southern District of New York on the ground that, at the time of the commencement of the action, he was a citizen of New Jersey, and the defendant in error, the plaintiff therein, was a citizen of the State of New York.

In granting a motion to remand the cause to the State Court, on the ground that there was no separable controversy between citizens of different States, Moloney and the defendant Adams, the holder of the record title, both being residents of the State of New York, Circuit Judge Lacombe

wrote the following memorandum of opinion: "The propriety of the removal is to be tested by the bill, not by the individual defenses to it. In a suit to foreclose a mortgage the original mortgage debtor and the subsequent purchaser of the property are both necessary parties and the controversy is not separable. (Ayers *v.* Wiswall, 112 U. S., 187.) As Adams, the subsequent purchaser, is a citizen of the same State as complainant, the cause must be remanded. May 11, 1895. E. H. Lacombe, U. S. Circuit Judge."

It is well settled that this Court cannot review the order of the Circuit Court remanding cause to the State Court.

Ill. Central R. R. Co. *v.* Brown, 156 U. S., 386.

Powers *v.* Chesapeake and Ohio R. R. Co., 169 U. S., 92.

Nor is the plaintiff in error aided by the decision of this Court in Powers *v.* Chesapeake and Ohio R. R. Co. (*supra*). That case holds simply that making a defense in a State Court after that Court has declined to surrender jurisdiction of the case, does not defeat the defendant's right to insist that the case has been lawfully removed into the Circuit Court of the United States, where the objection to jurisdiction of the State Court is saved upon the Record.

In the case at bar, the State Court did not decline to surrender jurisdiction, but on the contrary, the record was returned to the United States Circuit Court, and that Court, upon motion, remanded the case to the State Court, on the ground that there was no separable controversy wholly between citizens of different States. Besides, in the case at bar, no objection to the jurisdiction of the State Court is saved upon the Record. Even if, then, the Record showed

a case properly removable under the United States Statutes, there is no jurisdiction in this Court to review the judgment of the State Court.

POINT III.

It is manifest the writ was applied for for delay only.

This action has been pending since the 28th day of January, 1895, a period of over four years.

The defenses interposed in the State Court were purely technical and did not go to the merits.

As to the defense of *res adjudicata* by reason of the stipulation given in the first action, the Court of Appeals characterized the contention as "without support in authority or reason."

As to the defense based on the contention that the bond and mortgage were void for public policy, the Court of Appeals, in the first action, said that it "does not impress us as being a good defense, at least in this State."

It may properly be said, therefore, that in insisting upon those defenses in the State Court the purpose of the plaintiff in error was simply delay.

The resort to the extraordinary remedy of a review by this Court in such an action in which such defenses only were relied upon to defeat recovery needs no comment.

It is obvious that the plaintiff in error thus seeks to further hamper and delay the ends of justice and by some misstatement or the suppression of the facts, has been able to obtain a writ of error and bring this case to this Court.

The defendant in error has suffered actual loss by the delay, as the mortgaged property was advertised for sale and

additional expense has been incurred by reason of the postponement made necessary by the act of the plaintiff in error.

The present case seems to be eminently one for the imposition of damages authorized by the rules of this Court, where it is manifest that the writ was applied for solely for the purpose of delay.

POINT IV.

The writ of error should be dismissed and the judgment affirmed with the award of such damages as to this Court may seem just

Respectfully submitted.

ABRAM J. ROSE,
Counsel for Defendant in Error.

NELSON *v.* MOLONEY.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 767. Submitted April 17, 1899. — Decided May 1, 1899.

O'Brien being arrested in the State of New York for larceny, Nelson induced Moloney to join him in becoming O'Brien's bondsman, and gave Moloney a mortgage on his (Nelson's) real estate in New York to the amount of $10,000, to indemnify him. O'Brien having defaulted in his appearance for trial, Moloney was sued upon the bond, and a judgment was recovered against him, which was wholly paid by him. Before paying it he brought suit against Nelson to recover the amount for which he was so liable, and obtained a judgment in his favor in the trial court, which was reversed in the courts above on the ground that, as, at that time he had paid nothing on the forfeiture, no recovery could be had. In appealing from the trial court in that case he entered into the usual stipulation that, if the judgment appealed from should be affirmed, judgment absolute might be rendered against him. He then brought this suit to foreclose the mortgage. Meanwhile Nelson had transferred the property mortgaged to one Adams. The defendant contended that the stipulation given by the plaintiff on the appeal to that court in the prior action was a bar to the recovery in this action; and that the bond and mortgage having been given to indemnify bail in a criminal case, they were void because contrary to public policy. But the Court of Appeals held: (1) That the contention that the stipulation operated to prevent a recovery was without support in authority or reason; and (2) That it was not a part of the public policy of the State of New York to insist upon personal liability of sureties, and forbid bail to become indemnified. *Held:*

(1) That these conclusions involved no Federal question;

(2) That under the circumstances described in the opinion of the court, the proceedings in relation to the removal of the cause afforded no ground for the issue of the writ of error;

(3) That, following *Missouri Pacific Railway* v. *Fitzgerald*, 160 U. S. 556, the state court having proceeded to final judgment in this case, its action is not reviewable on writ of error to such judgment.

THIS was a suit brought by Dennis Moloney against Samuel Nelson, Albert J. Adams and others, in the Supreme Court of New York, city and county of New York, to foreclose a mortgage on real estate given Moloney by Nelson to secure a bond for ten thousand dollars in indemnification of Moloney against

loss by reason of becoming bail for one O'Brien. The judge before whom the case was tried found the facts as follows:

"I do find that in the month of October, 1891, one Thomas O'Brien was under arrest and confined in Albany County jail, charged with the crime of grand larceny in the first degree, and that on the 16th day of October, 1891, he was discharged from custody on giving a certain bail bond or recognizance in the sum of ten thousand dollars executed by himself, the defendant, Samuel Nelson, and the plaintiff, Dennis Moloney, conditioned that the said Thomas O'Brien should appear and answer the said charge in whatever court it may be prosecuted.

"That the defendant, Samuel Nelson, in order to induce the plaintiff to enter into said recognizance, agreed to indemnify him against liability thereunder, and the plaintiff relying upon said agreement and not otherwise entered into and executed the same as aforesaid and the said defendant, Samuel Nelson, immediately thereafter and in fulfilment of said agreement did execute and deliver to the plaintiff, Dennis Moloney, the bond and mortgage set up in the complaint in this action, which said mortgage was thereafter and on the 17th day of October, 1891, duly recorded in the office of the register of the city and county of New York.

"That thereafter and on the 2d day of November, 1891, the said Thomas O'Brien was called upon in the county court of Albany County to appear and answer the indictment above referred to, but did not appear and the bail bond or recognizance executed by said O'Brien, the plaintiff Dennis Moloney, and the defendant Samuel Nelson, was, on said 2d day of November, 1891, declared forfeited.

"That thereafter and before the commencement of this action, an action was brought by the people of the State of New York against the plaintiff, Dennis Moloney, and the defendant, Samuel Nelson, to recover upon said forfeited bail bond or recognizance, and on the 8th day of December, 1891, judgment in said action was duly entered in favor of the people of the State of New York against the defendant, Samuel Nelson, and the plaintiff, Dennis Moloney, for the sum of ten thousand and twenty-seven $\frac{13}{100}$ ($10,027.13) dollars, and the judgment roll

Counsel for the Motions.

duly filed in the office of the clerk of Albany County on said date.

"That thereafter executions upon said last-mentioned judgment were duly issued to the sheriff of Albany County, and the plaintiff's property was sold under said execution, and the entire amount of said judgment paid wholly by the plaintiff.

"That no part of the sum of ten thousand dollars secured by said bond and mortgage has been paid to the plaintiff and defendants agreed and consented on the trial of this action that interest upon said sum of ten thousand dollars should be computed from the 5th day of June, 1893."

And thereupon judgment of foreclosure and sale for the amount due and for payment of any deficiency, was entered.

Before this suit was commenced Moloney had brought a similar suit against Nelson and recovered judgment, which was reversed by the general term of the Supreme Court on the ground that it had been prematurely brought, because Moloney had not then paid anything on account of the judgment entered on the forfeiture of the criminal recognizance. *Moloney* v. *Nelson*, 70 Hun, 202. From that judgment Moloney prosecuted an appeal to the Court of Appeals, entering into the usual stipulation that if the judgment appealed from was affirmed, judgment absolute might be rendered against him. The judgment was affirmed and judgment absolute entered. *Moloney* v. *Nelson*, 144 N. Y. 182. After that this action was commenced, but in the meantime Nelson had transferred the property mortgaged to defendant Adams.

From the judgment of the trial court in this suit Nelson alone appealed to the Appellate Division of the Supreme Court in the First Department, by which it was affirmed. Nelson then carried the cause to the Court of Appeals, and the judgment of affirmance was affirmed. *Moloney* v. *Nelson*, 158 N. Y. 351. The record having been remitted to the Supreme Court, this writ of error was allowed, and motions to dismiss or affirm submitted.

Mr. Abram J. Rose for the motions.

Mr. William H. Newman and *Mr. Albert J. Adams, Jr.*, opposing.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

It is stated in the opinion of the Court of Appeals, by Chief Judge Parker, that the defences interposed by Nelson "upon the trial, and relied upon here, are: (1) The stipulation given by the plaintiff on the appeal to this court in a prior action brought to foreclose the mortgage is a bar to the recovery in this action. (2) The bond and mortgage having been given to indemnify bail in a criminal case, they are void, because contrary to public policy."

The Court of Appeals ruled that the contention that the stipulation given on appeal to that court operated to prevent a recovery, was "without support in authority or reason;" and as to the second ground relied upon to defeat the action, that it was not a part of the public policy of the State of New York to insist upon personal liability of sureties and forbid bail to become indemnified. These conclusions involved no Federal question, nor can we find on this record that any title, right, privilege or immunity under the Constitution or the laws of the United States was specially set up or claimed in the state courts, and that the decision of the highest court of the State in which a decision could be had was against any title, right, privilege or immunity so set up or claimed. But it is said that Nelson filed his petition and bond for the removal of the cause from the Supreme Court of the State of New York to the United States Circuit Court for the Southern District of New York on the ground that, at the time of the commencement of the action, he was a citizen of New Jersey and Moloney was a citizen of the State of New York, and that the action taken thereon raised a Federal question. It appeared that Moloney, and Adams, the holder of the record title to the property mortgaged, were both citizens of the State of New York, and it is not claimed that the state court denied the petition, but, on the contrary, conceded that

the record was transmitted to the Circuit Court, and that that court, on motion, remanded the cause to the state court because there was no separable controversy wholly between citizens of different States. This being so, the proceedings in relation to the removal of the cause afforded no ground for the issue of the writ of error.

In *Missouri Pacific Railway* v. *Fitzgerald*, 160 U. S. 556, 582, we held that: "If the Circuit Court remands a cause and the state court thereupon proceeds to final judgment, the action of the Circuit Court is not reviewable on writ of error to such judgment. A state court cannot be held to have decided against a Federal right, when it is the Circuit Court, and not the state court, which has denied its possession. . . . As under the statute a remanding order of the Circuit Court is not reviewable by this court on appeal or writ of error from or to that court, so it would seem to follow that it cannot be reviewed on writ of error to a state court, the prohibition being that 'no appeal or writ of error from the decision of a Circuit Court remanding such cause shall be allowed.' And it is entirely clear that a writ of error cannot be maintained under section 709 in respect of such an order where the state court has rendered no decision against a Federal right but simply accepted the conclusion of the Circuit Court."

Writ of error dismissed.